142-459

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

No. 118.

JAMES H. FISK, PLAINTIFF IN ERROR,

vs.

D. V. B. HENARIE, ELEANOR MARTIN, JAMES M. DONAHUE, ANNIE DONAHUE, AND MARY ELLEN VON SCHROEDER, EXECUTORS OF THE WILL OF PETER DONAHUE, DECEASED; THOMAS S. MARTIN, EDWARD MARTIN, AND JOHN D. WILCOX.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

FILED SEPTEMBER 25, 1888.

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

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1 DISTRICT OF OREGON, *ss:*

I certify that on the 14th day of August, 1888, at Portland, Oregon, Multnomah county, in said district, I duly served the within citation on writ of error upon the therein-named defendants' attorney, J. K. Kelly, and by delivering to him personally a true copy of said citation on writ of error, duly certified to by me as U. S. marshal.

JOHN MYERS,
United States Marshal,
By W. W. ROBERTS, *Deputy.*

2 UNITED STATES OF AMERICA, *District of Oregon,* } *ss:*

To D. V. B. Henarie, Eleanor Martin; James M. Donahue, Annie Donahue, and Mary Ellen Von Schroeder, executors of the will of Peter Donahue, dec'd; Thomas S. Martin, Edward Martin, and John D. Wilcox, Greeting:

You are hereby cited and admonished to be and appear at a Supréme Court of the United States to be holden at Washington on the second Monday in October, A. D. eighteen hundred and eighty-eight, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Oregon, wherein J. H. Fisk is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, in said district, this Aug. 13th, 1888.

MATTHEW P. DEADY,
U. S. District Judge, Oregon.

(Endorsed:) No. 1402. U. S. circuit court, district of Oregon. J. H. Fisk *vs.* D. V. B. Henarie *et al.* Citation on writ of error. Filed Aug. 14th, 1888. R. H. Lawson, clerk, by D. W. Stevens, deputy clerk.

3 In the Supreme Court of the United States.

J. H. FISK, Plaintiff,
vs.
D. V. B. HENARIE, ELEANOR MARTIN; James M. Donahue, Annie Donahue, and Mary Ellen Van Schroeder, Executors of the Will of Peter Donahue, Dec'd; Thomas S. Martin and John D. Wilcox and Edward Martin, Defendants.
No. 1402. Writ of Error.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the district of Oregon, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before the Honorable Matthew P. Deady, one of you, between J. H. Fisk, plaintiff and plaintiff in error, and D. V. B. Henarie, Eleanor Martin; James M. Donahue, Annie Donahue, and Mary Ellen Van Schroeder, executors of the will of Peter Donahue, dec'd; Thomas S. Martin, Edward Martin, and John D. Wilcox, defendants and defendants in error, a manifest error hath happened, to the great damage of the said plaintiff in error, as by complaint doth appear, and we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid and in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, A. D. eighteen hundred and eighty-eight, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being then and there inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States of America should be done.

Seal United States Circuit Court, Oregon.

Witness the Honorable Samuel F. Miller, senior associate justice of the Supreme Court of the United States, this August 13th, 1888.

R. H. LAMSON,
Clerk of the Circuit Court of the United States for the District of Oregon,
By WARD S. STEVENS,
Deputy Clerk.

[Endorsed:] In the Supreme Court of the United States. J. H. Fisk, pl'ff, *vs.* D. V. B. Henarie *et al.*, def'ts. Writ of error. Filed ——, —. —— ——, clerk, by —— ——, deputy clerk.

4 In the Supreme Court of the United States.

J. H. FISK, Plaintiff,
vs.
D. V. B. HENARIE, ELEANOR MARTIN; JAMES M. Donahue, Annie Donahue, and Mary Ellen Von Schroeder, Executors of the Will of Peter Donahue, dec'd; Thomas S. Martin and John D. Wilcox and Edward Martin, Defendants.

No. 1402. Writ of Error.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the district of Oregon, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before the Honorable Matthew P. Deady, one of you, between J. H. Fisk, plaintiff and plaintiff in error, and D. V. B. Henarie, Eleanor Martin; James M. Donahue, Annie Donahue, and Mary Ellen Von Schroeder, executors of the will of Peter Donahue, dec'd; Thomas J. Martin, Edward Martin, and John D. Wilcox, defendants and defendants in error, a manifest error hath happened, to the great damage of the said plaintiff in error, as by complaint doth appear, and we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid and in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, A. D. eighteen hundred and eighty-eight, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being then and there inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States of America should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this August 13, 1888.

[Seal of U. S. Circuit Court, Oregon.]

R. H. LAMSON,
Clerk of the Circuit Court of the United States
for the District of Oregon,
By WARD S. STEVENS.
Deputy Clerk.

[Endorsed:] In the Supreme Court of the United States. J. H. Fisk, pl'ff, *vs.* D. V. B. Henarie, *et al.*, def'ts. Writ of error.

5 In the Circuit Court of the United States for the District of Oregon, April Term, 1887.

Be it remembered that on the 30th day of September, 1887, there was duly filed in the circuit court of the United States for the district of Oregon a transcript on removal from State circuit court, Multnomah county, Oregon, in words and figures as follows, to wit:

(Pp. 6, 7, & 8, containing index to transcript on removal, omitted in printing. See general index.)

9 (*Complaint.*)

In the Circuit Court of the State of Oregon, for the County of Wasco.

J. H. FISK, Plaintiff,
vs.
DANIEL V. B. HENARIE, PETER DONAHUE, ELEANOR MARTIN, Thomas S. Martin, Edward Martin, John D. Wilcox, Defendants.

The above-named plaintiff complains of the above-named defendants, and for cause of action alleges—

That prior to and on the 4th day of October, 1881, said Daniel V. B. Henarie, Eleanor Martin, James V. Martin, Genevieve Martin, Peter D. Martin, Walter S. Martin, Andrew D. Martin, Thomas S. Martin, Edward Martin, and S. A. Frances M. Wilcox, wife of the said John D. Wilcox, were the owners of certain lands situated in the counties of Wasco, Grant, and Baker, in the State of Oregon, known as the Dalles Military Road Company's land, amounting in all to about six hundred thousand (600,000) acres, more or less.

II.

That said owners, being desirous of selling said lands, made a contract with plaintiff for that purpose, as follows:

Said D. V. Henarie and the said Eleanor Martin, for themselves, and the said Eleanor Martin, as the guardian of the said James V. Martin, Genevieve Martin, Peter D. Martin, Walter S. Martin, and Andrew D. Martin, the then minor children of the said Eleanor Martin and her husband, Edward Martin, Sen., then deceased, and Thomas S. Martin, Edward Martin, and S. A. Frances M. Wilcox, and her husband, John D. Wilcox, for themselves, agree to
10 and with this plaintiff that if he, said plaintiff, would procure a purchaser for said lands at the price of one dollar per acre they would pay him ten per cent. commission upon said purchase price. Said contract was made in or about the month of December, 1880.

III.

Plaintiff further alleges that, pursuant to said contract, he expended a large amount of time, labor, and money in his efforts to procure a purchaser of said property; that, by the procurement of

plaintiff, Leigh, Payne and Company, partners in business in Chicago, Illinois, agreed to purchase said property, and that on the 4th day of October, 1881, the said D. V. B. Henarie, Eleanor Martin, for herself, and Eleanor Martin, as guardian for James V. Martin, Genevieve Martin, Peter D. Martin, Walter S. Martin, and Andrew D. Martin, her minor children, Thomas S. Martin, Edward Martin, S. A. Frances M. Wilcox, and John D. Wilcox, by their attorney-in-fact, D. V. B. Henarie, and the said Liegh, Payne & Co. made and entered into a written contract, signed and sealed by said parties, for the sale of said property by the said first-named parties to the said Leigh, Payne & Co. upon the terms and conditions mentioned and described in said contract.

Said Leigh, Payne & Co. were to pay $600,000 for the property at the time and in the manner specified in said contract.

IV.

The plaintiff further alleges that subsequent to the making of the above-named contract all of the interests of the said minor children of the said Eleanor Martin became and were vested in the said Peter Donohue, and that on the 19th day of September, 1882,
11 in pursuance of the said procurement of a purchaser by this plaintiff, the said D. V. Henarie, Eleanor Martin, Thomas S. Martin, Edward Martin, Peter Donahue, and John D. Wilcox, who had become the trustee for the interest of his said wife, then deceased, in said property, and the said Leigh, Payne & Co. made and executed another agreement in writing as a modification of the said first agreement by which the said first-named parties were to sell said property to the said Leigh, Payne & Co. for the sum of $615,000.00, to be paid at the times and in the manner specified in said new agreement.

V.

Plaintiff further alleges that for reasons not known to him and which he cannot state the sale of the said property, as provided for in said agreement, was not consummated; but when the plaintiff ascertained this fact he proceeded to procure another purchaser for said property, and did procure another purchaser upon terms more favorable to the owners of said property than the terms named in the foregoing agreement which the said owners had executed.

VI.

Plaintiff further alleges that he submitted to Robert Bell, banker of the city of Portland, Oregon, copies of the above-named agreements, and the said Bell offered and agreed with this plaintiff to purchase said property of the said owners thereof upon the terms and conditions specified in said agreement, and as an inducement to the said owners to accept the proposition of said Bell he offered to pay said owners ten thousand dollars in cash down upon the execution of an agreement with him by them for the sale of said property, whereas the said agreements with Leigh, Payne & Co. did not provide for the payment of any part of the purchase-money

upon or at the time of their execution nor for several months thereafter.

12 Said Bell further offered to pay to said owners $10,000 upon the execution of any agreement by the owners of said property for the sale thereof to him upon the best terms which this plaintiff could procure from said owners.

Said Bell made said propositions in the months of January and February, 1883, and was then and ever since has been able and was then ready and willing to purchase said property upon the terms proposed by him.

VII.

Plaintiff further alleges that he went from Portland, Oregon, to San Francisco, California, and presented these offers of the said Bell to the owners of said property who lived there, and also presented said offers to such of the owners of said property as then lived in Oregon—said Wilcox, Ed. Martin, and Thos. S. Martin; that said parties in Oregon were willing to accept the said first offer of the said Bell; that said parties residing in San Francisco, viz., D. V. B. Henarie, Peter Donahue, and Eleanor Martin, declined to enter into any contract with said Bell for no other reason, as plaintiff is informed and believes, than because they were induced to believe by outside parties that they could obtain a higher price for said land.

VIII.

Plaintiff further alleges that he was fully authorized to contract for the sale of said property on the terms and conditions specified in said agreements with said Leigh, Payne & Co., and under such authority he procured for said owners a purchaser for said property in the person of the said Robert Bell, in addition to the procurement of the said Leigh, Payne & Co. as purchasers of said property, and that he performed, on his part, all things necessary and proper to enable said defendants to sell said property upon the terms

13 and conditions which they prescribed for its sale.

IX.

Plaintiff further alleges that the said defendants wrongfully and willfully and without any good reason or just cause refused to sell said property after plaintiff had procured purchasers therefor as aforesaid, and wholly neglected and refused to perform their contract with plaintiff, and still refuse so to do.

X.

Plaintiff further alleges that he expended much time and labor and a large amount of money in his efforts to procure purchasers as aforesaid for said property, and that he has fully performed said contract on his part and is justly entitled to his commissions upon the amount which said defendants agreed to take for said property, viz., $600,000.00, which said commissions amount to the sum of $60,000.

XI.

Plaintiff further alleges that the terms and conditions of the sale in the agreements with the said Leigh, Payne & Co. specified were satisfactory to the defendants, and that plaintiff was fully authorized by defendants to procure purchasers of said property on said terms and conditions, and that he did procure such purchaser as aforesaid, and that the sale of said property was not completed on account of the refusal and neglect of defendants to perform upon their part.

Wherefore plaintiff says that by the actings and doings of the defendants as aforesaid he has been damaged in the sum of sixty thousand dollars, for which amount he prays judgment against said defendants, together with his costs and disbursements in this action.

WILLIAMS, HILL, DURHAM,
THOMPSON & MAYS,
Pl'ff's Att'ys.

14 STATE OF OREGON, }
Multnomah County, } *ss:*

I, J. H. Fisk, being duly sworn, say I am the plaintiff above named; that the foregoing complaint is true, as I verily believe.

J. H. FISK.

Subscribed and sworn to before me this 5th day of November, 1883.

[SEAL.] GEO. H. DURHAM,
Notary Public for Oregon.

15 [Endorsed:] In the circuit court of the State of Oregon for Wasco county. J. H. Fisk, plaintiff, *vs.* D. V. B. Henarie *et al.*, defendants. Complaint. Filed Nov. 13th, 1883. Geo. H. Knaggs, county clerk. Williams, Hill, Durham, Thompson, and Mays, plaintiff's attorneys.

16 In the Circuit Court *for* the State of Oregon for the County of Wasco.

J. H. FISK, Plaintiff,
vs.
DANIEL V. B. HENARIE, ELEANOR MARTIN, PETER Donahue, Thomas S. Martin, Edward Martin, John D. Wilcox, Defendants. } Alias Summons.

To Thomas S. Martin and John D. Wilcox, the above-named defendants:

In the name of the State of Oregon you are hereby required to appear and answer the complaint filed against you in the above-entitled action within ten days from the date of the service of this summons upon you if served within this county, or if served within any other county of this State, then within twenty days from the

date of the service of this summons upon you; and, if you fail so to answer, for want thereof the plaintiff will take judgment against you for the sum of $60,000.00, damages, and for his costs and disbursements herein.

WILLIAMS, HILL, DURHAM,
THOMPSON & MAYS,
Attorneys for Plaintiff.

17 STATE OF OREGON, }
County of Multnomah, } *ss:*

I hereby certify that I served the within summons within said State and county on the 26th day of December, 1883, on the within-named Thomas S. Martin and John D. Wilcox by delivering a copy thereto, prepared and certified to by me as sheriff, together with a copy of the complaint, prepared and certified by G. H. Durham, one of pl'f's att'ys, to each of them in person.

GEO. C. SEARS,
Sheriff of Multnomah County, Oregon,
By A. W. WITHERALL, *Deputy.*

18 [Endorsed:] Alias summons. Circuit and county court. In the circuit court of the State of Oregon, county of Wasco. J. H. Fisk, plaintiff, *vs.* D. V. B. Henarie *et al.*, defendants. Filed Jan'y 11, 1884. Geo. H. Knaggs, county clerk. W., H., D., T. & M., pl'ff's att'ys.

19 (*Answer of T. S. Martin & J. D. Wilcox.*)

In the Circuit Court of the State of Oregon for the County of Wasco.

J. H. FISK, Plaintiff,
vs.
D. V. B. HENARIE, PETER DONAHUE, ELEANOR MARTIN, THOMAS S. MARTIN, EDWARD MARTIN, & J. D. WILCOX, Defendants.

The said defendants, Thomas S. Martin and J. D. Wilcox, answering the said complaint for themselves only, deny and allege as follows:

1. Answering the second paragraph of the complaint, these defendants deny that they or either of them made a contract with the plaintiff in or about the month of December, 1881, or at any time whereby they agreed that if the plaintiff would procure a purchaser for the lands described in the complaint at the price of one dollar per acre or at any price per acre they would pay him, in connection with the other defendants or otherwise, ten per cent. or any per cent. upon said purchase price.

2. Answering the third paragraph of the complaint, these defendants deny having any knowledge or information sufficient to form a belief whether the plaintiff did or did not expend a large amount or any amount of time, labor, or money in his efforts to procure a purchaser of the said property.

These defendants admit that some of the defendants entered into a contract with Leigh, Payne & Co. that if they would pay $600,000.00 for the said lands they would make a conveyance of the same in accordance with the terms of said contract, but these defendants deny that the said Leigh, Payne & Co. ever paid the said sum of $600,00–.00 or any part of the said sum of money, and deny that they ever were able to comply and that they ever did
20 comply with the terms of the said contract; and they deny that the said Leigh, Payne & Co. ever tendered the said sum of money to the defendants or to any person for them.

3. Answering the fourth paragraph of the complaint, these defendants say that the said Leigh, Payne & Co. were unable to comply with the terms of their contract dated October 4, 1881, and *was* unable to pay the sum of money which they agreed to pay for the said lands, to wit, $600,000; that afterwards they solicited the defendants in this action to extend the time for the payment of said land, and that all the defendants agreed with the said Leigh, Payne & Co., on the 19th day of September, 1882, to extend the time of payment for said lands for a period of six months longer upon the payment of $615,000 to the defendants for the said lands.

That this was the same agreement referred to in the fourth paragraph.

And these defendants deny that the said Leigh, Payne & Co. ever paid the said sum of $615,000 or any part of the said sum of money, and deny that they ever tendered the same or any part thereof to the defendants or to any person for them; and they deny that the said Leigh, Payne & Co. ever in any respect complied with the said contract entered into on the 19th day of September, 1882.

4. Answering the fifth paragraph of the complaint, these defendants say that the reason why the sale of the said land to the said Leigh, Payne & Co. was not consummated was that they, the said Leigh, Payne & Co., were not able to pay for the same as they had agreed to do; that they were real-estate brokers without sufficient means to pay the purchase price which they agreed to pay
21 and were unable to find a purchaser or purchasers to pay the same. These defendants deny that the plaintiff, after the failure of Leigh, Payne & Co. to purchase the said lands, procured another purchaser upon more favorable terms to the owners of said property than the terms specified in the agreements with Leigh, Payne & Co.

5. Answering the sixth paragraph of the complaint, these defendants admit that the plaintiff made an effort to procure a sale of the said lands to Robert Bell, but they deny that the terms of the contract proposed by the said Bell were satisfactory to the defendants, and deny that they were more favorable to the defendants than were the contracts with Leigh, Payne & Co.; and these defendants say they have no knowledge or information sufficient to form a belief whether the said Bell was or is able, ready, and willing to purchase the said property upon the terms proposed by him.

Defendants deny that the terms proposed by said Bell were satis-

factory to the defendants, and for that reason no contract was made with him by defendants in regard to said lands.

6. Answering the eighth paragraph of the complaint, these defendants deny that the plaintiff was fully authorized to contract for the sale of the said property on the terms and conditions specified in said agreements with Leigh, Payne & Co. with the said Robert Bell.

And deny that he was in any way authorized by the defendants or any of them to make any agreement with the said Bell in relation to the sale of said lands by the defendants to the said Bell; and they deny that plaintiff performed on his part all things or any things necessary or proper to enable said defendants to sell said property upon the conditions and terms prescribed by them for its sale.

7. Answering the ninth paragraph of the complaint, these
22 defendants deny that they wrongfully or without any good reason refused to sell said property after the plaintiff procured purchasers therefor, and deny that they neglected and refused to perform the said contract with the plaintiff; and, on the contrary, these defendants say they were justified and that all the defendants were justified in refusing to sell the said property because the purchasers or proposed purchasers procured by the plaintiff would not pay for said lands the moneys which they promised to pay.

8. Answering the tenth paragraph of the complaint, these defendants deny that the plaintiff fully performed or performed in any way said contract on his part, and deny that he is justly entitled to his commission or to any commission upon the amounts which defendants agreed to take for said lands or property, to wit, the sum of $60,000, or any sum or commission whatever; and these defendants deny that the plaintiff was entitled to any commission for selling said lands unless such sale was or should be consummated by the parties making such agreement.

9. Answering the eleventh paragraph of the complaint, these defendants admit that the terms and conditions of the sale in the agreement with Leigh, Payne & Co. were or would have been satisfactory to the defendants if the said Leigh, Payne & Co. had complied with such terms and paid for said lands as they agreed to do. These defendants deny that the plaintiff did procure purchasers, or any purchasers of said property.

And they deny that the sale of the said property was not completed through or on account of the refusal or neglect of the defendants to perform on their part; and, on the contrary, they aver that they were ready and willing to perform their contract with said Leigh, Payne & Co.

23 And, for a further and separate answer and defense to the said action, these defendants allege that the said alleged contract specified in the second paragraph and alleged to have been made in or about the month of December, 1880, was made, if made at all, with some of the other defendants in this action.

And they allege that the said contract was made in the State of California, and that the same was not in writing, but only a parol

contract; and these defendants, further answering, allege that the plaintiff was on and since the 4th day of October, 1881, a partner in the said firm of Leigh, Payne & Co, and that he had entered into an agreement with the said Leigh, Payne & Co. that if they would sell the said lands for a larger sum of money than the price to be paid to the defendants that he, the said plaintiff, was to be entitled to a share in all the profits to be made in any sale by the said Leigh, Payne & Co.

JAMES K. KELLY,
Attorney for Defendants T. S. Martin & J. D. Wilcox.

STATE OF OREGON, }
County of Multnomah, } *ss:*

I, Thomas S. Martin, being duly sworn, do say that I am one of the defendants in the above-entitled action, and that I believe the foregoing answer to be true.

THOMAS S. MARTIN.

Subscribed and sworn to before me this 11th day of January, 1884.

WM. FOLEY,
[SEAL.] *Notary Public for Oregon.*

24 [Endorsed:] J. H. Fisk *vs.* D. V. B. Henarie, Peter Donahue, Eleanor Martin, and others. Answer of Thomas S. Martin & J. D. Wilcox. Filed Jan'y 12th, 1884. Geo. H. Knaggs, county clerk.

25 *Original Summons.*

In the Circuit Court of the State of Oregon for the County of Wasco, *ss:*

J. H. FISK, Plaintiff,
vs.
DANIEL V. B. HENARIE, PETER DONAHUE, ELEANOR MARTIN, THOMAS S. MARTIN, EDWARD MARTIN, & JOHN D. WILCOX, Defendants. } Summons.

To Daniel V. B. Henarie, Peter Donahue, Eleanor Martin, Thomas S. Martin, Edward Martin, and John D. Wilcox, the above-named defendants:

In the name of the State of Oregon.

You are each hereby required to appear and answer the complaint filed against you in the above-entitled action within ten days from the date of the service of this summons upon you if served within this county, or if served in any other county of this State, then within twenty days from the date of the service of this summons upon you, and, if you fail to answer, for want thereof the plaintiff will take judgment against you for the sum of sixty thousand dollars and the costs and disbursements of this action.

WILLIAMS, HILL, DURHAM,
THOMPSON & MAYS,
Attorneys for Plaintiff.

26 STATE OF OREGON, } ss:
County of Wasco, }

I hereby certify that I served the within summons on the 13th day of November, 1883, at Dalles city, Wasco county, Oregon, on the within-named defendant, Edward Martin, by delivering to him in person a true and correct copy thereof, prepared and certified to by me as sheriff of said county, together with a copy of the complaint certified to by W. Lair Hill, one of pl'ff's att'ys and one of the firm of Williams, Hill, Durham, Thompson & Mays; and I further certify that after diligent search and inquiry I was and am still unable to find either of the within-named def'ts, Daniel V. B. Henarie, Peter Donahue, Eleanor Martin, Thomas Martin, and John D. Wilcox, within my county.

Dalles city, Oregon, Dec. 24th, 1883.

J. T. STORRS,
Sheriff of Wasco County, Oregon.

27 [Endorsed:] In the circuit court of the State of Oregon for the county of Wasco. J. H. Fisk, plaintiff, *vs.* Daniel V. B. Henarie *et al.*, defendants. Original summons. Filed this 26th day of Dec., 1883. Geo. H. Knaggs, clerk. Sheriff's fees, $—. Williams, Hill, Durham, Thompson & Mays, attorneys for plaintiff.

28 *Answer of Edw. Martin.*

In the Circuit Court of the State of Oregon for the County of Wasco.

J. H. FISK, Plaintiff,
vs.
DANIEL V. B. HENARIE, PETER DONAHUE, ELEANOR MARTIN, Thos. S. Martin, Edward Martin, and John D. Wilcox, Defendants.

The above-named defendant, Edward Martin, for his separate answer to the complaint of plaintiff alleges as follows:

2. To the second division of the complaint he says he has not knowledge or information sufficient to form a belief as to whether the plaintiff did or did not make a contract with the defendants or any of them, as set forth in the complaint, but he avers that any such contract, if made, was an oral contract and not a contract in writing.

This defendant, answering for himself, denies that in or about the month of December, 1880, or at any other time he either individually or jointly with the other defendants or either of them agreed with the plaintiff that if he, the said plaintiff, would procure a purchaser for the said lands described in the complaint at the price of one dollar per acre or at any other price or rate per acre he either individually or jointly with the other defendants would pay him, the said plaintiff, ten per cent. commission or any commission whatever upon the said price.

3. Answering the third division of the complaint, this defendant says he has not knowledge or information sufficient to form a belief whether the plaintiff did or did not in pursuance of said alleged contract expend a large or any amount of time or labor
29 or money in his efforts to procure a purchaser of the said property; denies having any knowledge or information sufficient to form a belief whether by the procurement of the plaintiff Leigh, Payne & Co., partners in business, in Chicago, Illinois, agreed to purchase the said property.

This defendant admits that the said Leigh, Payne & Co. made and entered into a written contract on or about the fourth day of October, 1881, with the defendants or some of them for the sale of said property by said first-named parties to the said Leigh, Payne & Co. upon the terms and conditions mentioned in said contract.

That said Leigh, Payne & Co. by the terms of said contract were to pay for the said property the sum of $600,000 within a certain time or times specified in the said contract, but this def't denies that the said Leigh, Payne & Co. performed the conditions of the said contract in any respect, and aver that they never paid any portion of the said $600,000 for the said property.

4. Answering the fourth division of the said complaint, this def't admits that subsequent to the making of the said contract and after the said Leigh, Payne & Co. had failed and neglected to fulfill and keep their contract with these def'ts they entered into another with them, by which some of the def'ts were to sell and agreed to sell to the said Leigh, Payne & Co. the said property for the sum of $615,000, to be paid at the times and in the manner specified in the said agreement, but this defendant denies that he individually or in connection with the other defendants executed the said contract; and he denies that the said Leigh, Payne & Co. performed the conditions of the said contract on their part, and avers that they never paid any portion of the said $615,000 for the said property, as they agreed to do.

30 5. Answering the fifth division of the said complaint, this defendant says the reason why the sales of the said property to Leigh, Payne & Co. were not consummated was because the said Leigh, Payne & Co. were unable or unwilling to pay for the said property the sum of money which they agreed to pay. This defendant denies the allegation of plaintiff that when he ascertained the fact that Leigh, Payne & Co. failed to keep and perform their contract in regard to the payment of the price of said property he then proceeded to procure another purchaser for the said property upon terms more favorable to the owners thereof than the terms named in the agreement with Leigh, Payne & Co.

6. Answering the sixth division of the said complaint, this defendant denies that Robert Bell, banker, of Portland, ever offered and agreed with the pl'ff to purchase the said property upon the terms and conditions specified in said agreement, and denies that, as an inducement to the said owners to accept the proposition of the said Bell, he offered to pay said owners $10,000 in cash down or any other sum of money upon the execution of an agreement with them for

the sale of said property. This defendant denies that said Bell further offered to pay said owners $10,000 or any sum upon the execution of any agreement by the owners of said property for the sale thereof to him upon the best terms which plaintiff could procure from said owners.

He denies that said Bell made said proposition in the month of January or February, 1883, or at any time, and denies that he was then or ever since has been able or that he was ready and willing to purchase said property upon any terms proposed by him and agreed to by the defendants.

7. Answering the seventh division of the complaint, this defendant denies that the plaintiff at any time presented the offers
31 of said Bell to him or said anything to him about any proposition of the said Bell to purchase the said property. He denies that he was ever willing to accept any proposition or offer from the said Bell, and avers that none was made to him either by the plaintiff or the said Bell.

8. Answering the eighth division of the said complaint, says he has no knowledge or information as to whether the plaintiff was authorized to contract for the said property on the terms and conditions specified in the said agreement with Leigh, Payne & Co., but denies that under such authority he procured for such owners a purchaser of said property in the person of the said Robert Bell; and he denies that the plaintiff performed on his part all things or any things necessary or proper to enable the defendants to sell said property upon the terms and conditions which they prescribed for the sale thereof.

9. Answering the ninth division of said complaint, this defendant denies that the said defendants wrongfully or willfully or without good reason or just cause refused to sell said property after pl'ff had procured a purchaser thereof, and he denies that said defendants neglected and refused to perform their contract with plaintiff, or that they still refuse.

10. Answering the tenth division of said complaint, denies that the plaintiff has fully or at all performed said contract on his part, or that he is justly entitled to his commissions or any commission upon the amount of $600,000 or any sum, in the sum of $60,000 or any other sum.

11. Answering the eleventh division of the said complaint, this def't admits that the terms and conditions for the sale to the said Leigh, Payne & Co. would have been satisfactory to the def'ts if they had complied with the same and paid the purchase-money for the
32 said property. He denies that the plaintiff procured any purchaser for the same, and denies that the sale was not completed on account of any refusal or neglect of defendants to perform and keep the same on their part.

And for a further and separate defense to this action this defendant alleges that the plaintiff was deeply interested with the said Leigh, Payne & Co. in effecting a sale of the said property, and that he had an agreement with the said Leigh, Payne & Co. that

they were to pay him a large commission in case they should become the purchasers of the said property from the defendants.

That the plaintiff, at the time he induced the defendants to enter into the said agreement with Leigh, Payne & Co., knew that they were unable to purchase or pay for the said property, and that they could only do so in case they should be able to resell the same to some other purchaser; and this defendant avers that the plaintiff was interested with the said Leigh, Payne & Co. in endeavoring to find a purchaser from them for the said property upon and for a much larger consideration and price than they had agreed to pay the defendants for the same; that said Leigh, Payne & Co. could not procure a purchaser or purchasers from themselves for the said property because they asked a much larger sum of money for the same that the said property was worth; that, being unable to sell said property, the said Leigh, Payne & Co. were unable to pay the defendants the said sum of $600,000 or the said sum of $615,000, and that the plaintiff was a member of the firm of Leigh, Payne & Co. in the agreement to purchase the said property from the defendants, and that he was also to share in any profits which might have been made by that firm in case they had been able to sell and dispose of the said property at a profit to any other person or persons.

JAMES K. KELLY,
Att'y for Edward Martin.

33 STATE OF OREGON, } *ss:*
County of Multnomah, }

I, Edward Martin, being duly sworn, do say that I am one of the defendants, and that I believe the foregoing answer to be true.

EDWARD MARTIN.

Subscribed and sworn to before me this 21 day of Nov., 1883.
[SEAL.]
WM. FOLEY,
Notary Public for Oregon.

34 [Endorsed:] J. H. Fisk *vs.* D. V. B. Henarie & others. Answer of Edward Martin. Filed Nov. 22, 1883. Geo. H. Knaggs, county clerk.

35 *Affidavit for Publication of Summons.*

In the Circuit Court of the State of Oregon for the County of Wasco.

J. H. FISK, Plaintiff,
vs.
DANIEL V. B. HENARIE, PETER DONOHUE, ELEANOR MARTIN, Thomas S. Martin, Edward Martin, & John D. Wilcox, Defendants.

STATE OF OREGON, } *ss:*
Multnomah County, }

I, J. H. Fisk, being first duly sworn, depose and say that I am the

plaintiff in the above-entitled cause; that the defendants Daniel V. B. Henarie, Peter Donohue, and Eleanor Martin, after due and diligent search, cannot be found within the State of Oregon; that they are not now within the State of Oregon, nor do they or either of them reside therein, but they and each of them reside and now are in the State of California, at the city of San Francisco; that a good cause of action exists in the above-entitled case against said defendants therein and in favor of this plaintiff, which said cause of action is fully stated and set forth in the complaint herein filed, which said complaint is hereby referred to and made a part of this affidavit, to be read herewith; that the defendants have property, consisting of lands, situated in Wasco county, and elswhere in this State; that said lands are also fully described in said complaint; that a writ of attachment has been sued out herein against the property of said non-resident defendants, and affiant believes that said writ will be duly levied upon said lands.

36 That this court has jurisdiction of the subject of this action, as will appear by said complaint, made a part hereof as aforesaid.

J. H. FISK.

Subscribed and sworn to before me this 17th day of December, 1883.

[SEAL.] GEO. H. DURHAM,
Notary Public for Oregon.

STATE OF OREGON, } ss:
Wasco County, }

Upon reading and filing the foregoing affidavit and reading the complaint herein filed and referred to in said affidavit, and having W. Lair Hill, one of the plaintiff's attorneys, it appears to the satisfaction of the undersigned, the judge of said court, that the defendants Daniel V. B. Henarie, Eleanor Martin, and Peter Donahue are not residents of the State of Oregon, and are not within said State and cannot be found within said State; that a cause of action exists in favor of said plaintiff against each and all of said defendants; that said non-resident defendants each have property within said State and county, and that said court has jurisdiction of the subject-matter of this action; that a writ of attachment against the property of said non-resident defendants has been sued out herein. It is therefore ordered that service of process herein be made upon said Daniel V. B. Henarie, Eleanor Martain, and Peter Donohue by publication of summons herein against them for six successive weeks in

37 The Dalles Times Mountaineer, a weekly newspaper published at The Dalles, Wasco county, Oregon, and generally circulated in the State and elsewhere, and that a copy of said summons, together with a copy of the complaint herein, be forthwith deposited in the post office prepaid, addressed severally to each of said non-resident defendants, viz: Daniel V. B. Henarie, Eleanor Mar-

tin, and Peter Donohue, at San Francisco, California, the residence of said defendants.

Dated at chambers this 2nd day of February, 1884.

A. S. BENNETT,
Circuit Judge.

38 [Endorsed:] In the circuit court of the State of Oregon for Wasco county. J. H. Fisk, plaintiff, *vs.* D. V. B. Henarie *et al.*, defendants. Affidavit for publication of summons and order therefore. Filed February 8th, 1884. Geo. H. Knaggs, county clerk.

39 *Answer of Henarie, Donahue, and Eleanor Martin.*

In the Circuit Court of the — for the — in and for the — of Oregon.

J. H. Fisk, Plaintiff,
vs.
Daniel V. B. Henarie, Peter Donahue, Eleanor Martin, Thomas S. Martin, and Edward Martin, Defendants.

The defendants Daniel V. B. Henarie, Peter Donahue, and Eleanor Martin, separately answering the complaint in the above action by their attorneys—

Deny that said owners made a contract with plaintiff for the purpose of selling said land, as in complaint stated.

Deny, and each of these defendants separately denies, that said D. V. B. Henarie and the said Eleanor Martin, as the guardian of the said minor children of said Edward Martin, or in any other capacity, and Thomas S. Martin, Edward Martin, S. A. Frances, M. Wilcox, and her husband, John D. Wilcox, or any or either of them, for themselves or himself or herself, agreed to or with plaintiff that if he, plaintiff, would procure a purchaser for said lands at the price of one dollar per acre, or at any other price, they or either of them would pay him ten per cent. commission, or any commission, on said or on any purchase price; and—

Deny that said contract was made in or about the month of December, 1880, or at any other time; on the contrary, these defendants aver that no contract or agreement of any kind was ever made between them or either of them and plaintiff, except a parole promise and agreement by certain of said defendants that if said plain-

40 tiff would procure a purchaser for said property at said price who would pay for the same in cash, or in part cash and part satisfactory securities, the said plaintiff should be entitled to a prorated portion of said cash or said securities and cash at the time when the same were received, of ten per cent. of the amount or security so received as commissions, payable exclusively out of the same, provided that such purchaser would pay at the time of agreeing to purchase said property such a sum of money as a prepayment to bind the bargain as would be satisfactory for that purpose to the said owners.

And these defendants, further answering, deny on information

and belief that pursuant to said contract or otherwise plaintiff expended a large amount of time, labor, or money in his efforts to procure a purchaser of said property.

Admits that by procurement of plaintiff Leigh, Payne & Co. agreed to purchase said property, and that on the 4th day of October, 1881, these defendants, Henarie and Eleanor Martin,
41 for herself and as guardian for the said minor children, and said defendants, Thomas S. Martin, Edward Martin, S. A. Francis, M. Wilcox, and John D. Wilcox, and the said Leigh, Payne & Co., entered into a written contract, under seal, for the sale of the said property by the said first-named parties to said Leigh, Payne & Co. upon the terms and conditions mentioned in said contract, and that said Leigh, Payne & Co. was to pay six hundred thousand dollars ($600,000) for the said property; but these defendants aver that said Leigh, Payne & Co. by the terms of said contract were required, and they agreed, that of the said sum of six hundred thousand dollars ($600,000) they would pay to said first-named parties the sum of one hundred and eighty thousand ($180,000.00) dollars thereof on or before the first day of April, 1882, the sum of one hundred and forty thousand dollars ($140,000.00) thereof on or before the first day of July, 1882, the sum of one hundred and forty thousand dollars ($140,000) on or before the first day of October, 1882, and the remaining sum of
42 one hundred and forty thousand dollars ($140,000) thereof on or before the first day of December, 1882; and these defendants aver that on the 19th September, 1882, neither any of the said sums of money nor any part thereof had been paid out — these defendants, Henarie and Eleanor Martin, and the said first-named parties who had been misled by the said Leigh, Payne & Co. and were induced to enter into the said contract of October 4th, 1881, by the representation of said Leigh, Payne & Co. that they had made such arrangements as to the disposition and control of the said property that they would be certainly able to obtain from the same or from other sources the respective sums of money by them contracted to be paid for said property and would surely pay the same promptly, as said sums respectively fell due, on the days and at the times hereinbefore mentioned, now finding the said Leigh, Payne & Co. unable to pay the said monies or any part thereof or to sustain their said representations, and having been deterred by said contract from selling said property to other persons, and being positively assured by said Leigh, Payne & Co. that by modifying said contract and in some respects altering the conditions of the payment of said sums of six hundred thousand dollars ($600,000) thereunder the payment of the same in such modified manner would be fully secured and the said sum would be wholly paid, with an addition of fifteen thousand dollars ($15,000) thereto, they agreed to and did make such modification, to wit, on the 19th day of September, 1882.

And these defendants further aver that said plaintiff agreed to and fully sanctioned the said contract of October 4th, 1881, and the said modification of September 19th, 1882, and allege that his claim

upon these and all the other defendants for compensation or commission depended upon the performance by said Leigh, Payne & Co. of the conditions of said contract and said modifications thereof,

and that said plaintiff so agreed and admitted that he so
43 agreed, but these defendants aver that said Leigh, Payne & Co. did not perform all or any of the conditions of said contract or of the said modifications thereof, but wholly committed a breach of the covenants and each of the covenants of said contract and said modification.

And these defendants, further answering, admit that subsequent to the making of said contract, dated October 4th, 1881, all of the interest of the said minor children became vested in this defendant, Peter Donohue, and that on the 19th day of September, 1882, these defendants, Henarie, Eleanor Martin, and Donohue, and the other defendants herein and the said Leigh, Payne & Co. executed another agreement in writing as a modification of the said first agreement, to wit, the modification and agreement therefor hereinbefore mentioned, by which the said first-named parties were to sell said property to the said Leigh, Payne & Co. for the sum of six hundred and fifteen thousand dollars ($615,000), to be paid at the times and in the manner specified in said modification, but they deny that the same was made in pursuance of the said procurement of a purchaser by plaintiff; and these defendants, further answering, admit that the sale of said property as provided for in said agreement, to wit, the said modification, was not consummated, but they deny that this was for reasons not known to plaintiff; on the contrary, they aver that by the terms of said modifying agreement of September 19th, 1882, not less than twenty-five thousand dollars ($25,000) in cash was to be paid by said Leigh, Payne & Co. on or before the 1st day of January, 1883, and seventy-five thousand ($75,000) within two months thereafter, and the payment of the residue of the purchase-money was to be secured by debenture bonds and in other ways, yet the said Leigh, Payne & Co. never paid said consideration nor any part thereof and made no cash payment of twenty-five thousand dollars or any other sum on said 1st day of

January, 1883, or at any other time and never complied
44 with or kept the terms and covenants of said modifying agreement of September 19th, 1882, or any of them, but made a complete and total default therein and thereof, all of which was well known to plaintiff.

And these defendants deny that plaintiff proceeded to or did at any time procure another purchaser for said property upon terms more favorable to the owners of the said property than the terms named in the foregoing agreement which the said owners had executed or upon terms as favorable as said terms.

And these defendants, further answering, say that they and each of them have and has no knowledge or information sufficient to form a belief as to whether plaintiff did or did not submit to Robert Bell, banker, of the city of Portland, Oregon, copies of the above-named agreements, but they deny on information and belief that said Bell ever offered or agreed with plaintiff to purchase said property of the

said owners thereof upon the terms or conditions specified in said agreement, and deny that as an inducement to the said owners to accept the said proposition of the said Bell he offered to pay said owners ten thousand dollars ($10,000) in cash upon the execution of an agreement with him by them for the sale of said property; deny that said Bell further or at all offered to pay to said owners ten thousand dollars ($10,000) or any sum upon the execution of any agreement by the owners of said property for the sale thereof to him upon the best terms which plaintiff could procure from said owners; deny that said Bell made said proposition in the month of January or February, 1883, or at any time or was then or ever or at any time since has been able or ready or willing to purchase said property upon any terms proposed by him and agreed to by said owners or any of them. On the contrary, these defendants aver that plaintiff represented that said Bell, with whom defendants never had any communication directly, offered to purchase said property
45 upon terms which were entirely unsatisfactory to the said owners and altogether different from any terms upon which they had ever intended to agree to sell said property, and that said terms were at once rejected by said owners.

And these defendants, further answering, deny that plaintiff went from Portland, Oregon, to San Francisco, California, and presented or that he ever at any time or place presented these offers, to wit, the offers in complaint mentioned, to the owners of said property who lived there, to wit, these defendants, or to either of them.

Deny on information and belief that plaintiff presented said offers to such of the owners of said property as then lived in Oregon, said Wilcox, Edward Martin, or Thomas S. Martin, or either of them.

Deny on information and belief that said parties in Oregon, or any of them, were willing to accept the said first or any offer of said Bell.

These defendants deny that they declined to enter into any contract with said Bell, but admit they declined to enter into such a contract with him as plaintiff proposed, as hereinbefore mentioned.

And deny that they so declined or at all declined because they were induced to believe by outside parties or at all that they could obtain any higher price for said land.

And these defendants, further answering, deny upon information and belief that plaintiff was authorized to contract for the sale of said property on the terms and conditions specified in said agreement with said Leigh, Payne & Co.

Deny that under such authority or otherwise he procured for said owners a purchaser for said property in the person of said Robert Bell, either otherwise or in addition to the procurement of said Leigh, Payne & Co. as purchasers of said property, or that he performed on his part all or any of the things necessary or
46 proper to enable said defendants to sell said property upon the terms and conditions which they prescribed for the sale thereof.

And these defendants, further answering, deny that they or the

said defendants wrongfully or willfully or without any good reason or just cause refused to sell said property after plaintiff had procured purchasers or any purchaser therefor.

Deny that they or the said defendants neglected or refused to perform their said or any contract with plaintiff or still do refuse so to do.

And these defendants, further answering, deny upon information and belief that plaintiff has expended much time or labor or a large amount of money in his efforts to procure purchasers as aforesaid for said property.

Deny that he has fully or at all performed said contract on his part, or that he is justly entitled to his commissions or any commissions upon the amount which said defendants agreed to take for said property, viz., six hundred thousand dollars ($600,000), or that they did agree to take such amount, except upon conditions that were never complied with, or that said commissions amount to the sum of sixty thousand dollars ($60,000) or any sum of money.

And these defendants, further answering, admit that the terms and conditions for the sale in the agreement with said Leigh, Payne & Co. specified would have been satisfactory to these defendants if they had complied with the same and paid the purchase-money for the said property.

Deny that the plaintiff was fully or at all authorized by these defendants or by the defendants to procure purchasers of said property on said terms and conditions, or that he did procure such purchasers, or that the sale of said property was not completed on account of the refusal or neglect of defendants or of these defendants or either of them to perform on their part.

47 And for a further and separate defense to this action these defendants allege upon information and belief that the plaintiff was deeply interested with the said Leigh, Payne & Co. in effecting a sale of the said property, and that he had an agreement with the said Leigh, Payne & Co. that they were to pay him a large commission in case they should become the purchasers of the said property from the defendants.

That the plaintiff induced the defendants to enter into the said agreement with Leigh, Payne & Co., and that at the time he induced the defendants to enter into the said agreement he knew that they were unable to purchase or pay for the said property, and that they could only do so in case they should be able to resell the same to some other purchaser, and these defendants aver upon information and belief that the plaintiff was interested with the said Leigh, Payne & Co. in endeavoring to find a purchaser from them for the said property upon and for a much larger consideration and price than they had agreed to pay the defendants for the same.

That said Leigh, Payne & Co. could not procure a purchaser or purchasers from themselves for said property because they asked a much larger sum of money for the same than the said property was worth.

That, being unable to sell the said property, said Leigh, Payne & Co. were unable to pay the defendants the said sum of six hundred

thousand dollars ($600,000) or the said sum of six hundred and fifteen thousand dollars ($615,000) or any part thereof.

That the plaintiff was a member of the firm of Leigh, Payne & Co. in the agreement to purchase the said property from the defendants, and that he was also to share in any profits which might have been made by that firm in case they had been able to sell and
48 dispose of the said property at a profit to any other person or persons.

And, for a further and separate answer and defense, these defendants say that at the time of making the alleged agreement or any agreement with the said plaintiff these defendants were residents and each of them was a resident of the State of California.

That the agreement made between plaintiff and these defendants was such as hereinbefore set forth and was by parol, and was orally made; that it was made in the State of California and in the city of San Francisco; that it was not in writing; that it was made under and subject to the laws of the State of California; that in and by said laws and by subdivision six of section sixteen hundred and twenty-four of the Civil Code of said State, then and hitherto in force in said State, it was and is provided that an agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation or commission is invalid unless the same or some note or memorandum thereof be in writing and subscribed by the party to be charged or by his agent; that said agreement was not to be performed in the State of Oregon, but, on the contrary, the purchaser of said lands, upon securing whom and upon the payment by him of the said purchase-money plaintiff was to receive a commission as aforesaid, was to be procured in some other portion of the United States than the State of Oregon or in Europe, and the sale was to be concluded, the business performed, and the purchase-money paid in the city and county of San Francisco.

Wherefore the defendants pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

JAMES K. KELLY,
Att'y for Def'ts.

49 STATE OF CALIFORNIA, } ss:
City and County of San Francisco, }

We, Daniel V. B. Henarie, Peter Donahue, and Eleanor Martin, being duly sworn according to law, do say that we are defendants in the above-entitled cause, and that we believe the foregoing answer to be true.

D. V. B. HENARIE.
P. DONAHUE.
ELEANOR MARTIN.

Subscribed and sworn to before me this fourteenth day of March, A. D. 1884.

EUGENE W. LEVY,
[SEAL.] *Commissioner of Deeds for the State of Oregon in California.*

50 [Endorsed:] J. H. Fisk, plaintiff, *vs.* Daniel V. B. Henarie *et al.*, defendants. Separate answer of def'ts D. V. B. Henarie, Peter Donahue, and Eleanor Martin. Filed August 21, A. D. 1884. George H. Thompson, clerk.

51 In the Circuit Court of the State of Oregon for Wasco County.

J. H. Fisk, Plaintiff,
vs.
Daniel V. B. Henarie, Peter Donahue, Eleanor Martin, Thomas J. Martin, Edward Martin, and J. D. Wilcox, Defendants.

Plaintiff's Reply to Separate Answer of Def'ts Henarie, Donahue, and Eleanor Martin.

The plaintiff, for reply to the answer of the defendants D. V. B. Henarie, Peter Donahue, and Eleanor Martin, herein separately filed, denies that no contract or agreement of any kind was ever made between said def'ts or any or either of them and himself except a parol promise and agreement, as stated and set forth in said answer from and including line 23 of page 2 to and including line 20 of page 3 thereof; denies that the contract between said def'ts and himself in the said complaint and answer referred to was a parol or oral contract; but, on the contrary, avers that said contract was and is in writing, and is signed by said Henarie, and that in making the same he, the said Henarie, acted for and on behalf and by the authority and consent of all the defendants herein.

Denies that the alleged contract set forth on said 2d and 3d pages of said answer last mentioned was the contract made between pl'ff and the def'ts, but avers that said contract was and is as stated in his complaint, and not otherwise.

Denies that pl'ff was confined to the purchase price received for said lands, exclusively or at all, for his commissions for his said services in procuring a purchaser therefor.

Deny that def'ts could or would have sold said lands or any portion thereof had they not been deterred therefrom by said or any contract with Leigh, Payne & Co. or any one.

Admits that after default was made on the modified con-
52 tract plaintiff learned that the negotiations were broken off, but did not learn or was he informed by either Leigh, Payne & Co. or said def'ts what the reason- therefore were, nor did he receive any information on the subject prior to or other than a letter by him received from said Henarie notifying him that said def't, Thos. Martin, had withdrawn his portion of said lands from sale for the time.

Denies that pl'ff represented to said def'ts or any of them that said Bell offered to purchase said property upon terms which were entirely unsatisfactory to the said owners or altogether or materially different, save in being favorable to said owners, from any terms upon which they had ever intended or agreed to sell said property, or that said terms were at once rejected by said owners; but plaintiff avers that the various propositions made by said Bell were severally more favorable to said owners than were the contracts aforesaid with

said Leigh, Payne & Co., and were only rejected by defendants after considerable delay and consultation among themselves.

Denies that pl'ff was deeply or at all interested with the said Leigh, Payne & Co. in effecting a sale of the said property, or that he had an or any agreement with Leigh, Payne & Co. that they were to pay him a large or any commission in case they should become the purchasers of said property from the defendants.

Denies that at the time said def'ts entered into said agreement with said Leigh, Payne & Co. he knew that the latter were unable to purchase or pay for the said property, or that he ever so knew or that they could only do so in case they should be able to resell the same to some other purchaser.

Denies that pl'ff was interested with the said Leigh, Payne & Co. in endeavoring to find a purchaser from them for the said
53 property upon or for a much or any larger consideration or price than they had agreed to pay the defendants therefor or at all.

Denies any knowledge or information as to whether said Leigh, Payne & Co. could not procure a purchaser or purchasers from themselves either because they asked a much or any larger sum of money for the same than the said property was worth or otherwise or at all, or as to whether they were unable to pay the defendants the said sum of $600,000 or the said sum of $615,000 or any part thereof for said property because they were unable to sell the said property, for any other reason or at all.

Denies that pl'ff was a member of the said firm of Leigh, Payne & Co. in the agreement to purchase the said property from said defendants or the defendants or at all, or that he was to share in any profits which might have been made by that firm in case they had been able to sell or dispose of said property at a profit to any other person or persons.

Denies that the agreement between pl'ff and these defendants was such as in said answer is set forth, or that it was by parol, or that it was orally made, or that it was made in the State of California or the city of San Francisco, or that it was not in writing, or that it was made under or subject to the laws of the State of California; that as to whether the laws of that State or by subdivision six of sec. 1624 of the Civil Code of that State, then or hitherto in force therein, it was or is provided that an agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation or a commission is invalid unless the same or some note or memorandum thereof be in writing or subscribed by the party to be charged or his agent, the pl'ff has not sufficient knowledge or information to form a belief.

Denies that said agreement was not to be performed in the State of Oregon, or that the proposed purchaser of said property
54 was to be procured in some other portion of the United States than in the State of Oregon or in Europe, or that the sale was to be concluded or the business performed or the purchase-money paid only in the city and county of San Francisco.

And plaintiff avers that in making said sale he was not confined or limited to any country or class of persons or to any State.

Wherefore he prays as in his complaint.

HILL & MAYS & WILLIAMS,
DURHAM & THOMPSON,
Pl'ff's Att'ys.

STATE OF OREGON, *Multnomah County,* } *ss:*

I, J. H. Fisk, the above-named plaintiff, being first duly sworn, say the foregoing reply is true, as I verily believe.

J. H. FISK.

Subscribed and sworn to before me this 29th day of August, 1884.

[SEAL.] WALLACE MOUNK,
Notary Public for Oregon.

55 [Endorsed:] In the circuit court of the State of Oregon for Wasco county. J. H. Fisk, p'ff, *vs.* D.V. B. Henarie *et al.*, def'ts. Reply to answer of D. V. B. Henarie, Eleanor Martin, & P. Donahue. Filed September 1st, 1884. Geo. H. Thompson, clerk. Hill & Mays & Williams, Durham & Thompson, plaintiff's attorneys.

56 In the Circuit Court of the State of Oregon for Wasco County.

J. H. FISK, Plaintiff,
vs.
D. V. B. HENARIE, PETER DONOHUE, Eleanor Martin, Thomas J. Martin, Edward Martin, & John D. Wilcox, D'f'ts.

Reply to Separate Answer of Thos. J. Martin & John D. Wilcox.

Plaintiff, replying to the separate answer of defendants Thos. J. Martin and J. D. Wilcox, herein filed, says he has no sufficient knowledge or information to form a belief as to whether the reasons alleged in paragraph 4 of said answer, which purports to be an answer to paragraph 5 of said complaint, are the reasons why said contract between said Leigh, Payne & Co. and the def'ts was not consummated, or as to whether said Leigh, Payne & Co. were unable to pay for said property or were unable to sell the same or find a purchaser therefor.

That as to why no contract was made by the def'ts with said Bell in regard to said lands except as in his complaint stated pl'ff has no knowledge or information sufficient to form a belief.

For reply to the 7th paragraph of said answer (answering the 9th paragraph of complaint) p'ff denies that the def'ts were justified or that any of them were justified in refusing to sell the said property for the reasons in said answer stated or for any reasons, and denies that the said proposed purchaser, Bell, would not pay for said lands as he proposed, or that his proposed terms were not as favorable for def'ts as were the terms of the contract with Leigh, Payne & Co.

Replying to said def'ts' answer to the 11th paragraph of said complaint, p'ff denies knowledge or information as to whether or
57 not the def'ts were ready or willing to perform their said contract with said Leigh, Payne & Co.

Replying to the further and separate answer and defense of said def'ts, p'ff alleges that all and each of said contracts was made by and with the consent & for the benefit of all said def'ts; deny that the said contract was made in the State of California, or that the same was not in writing or was only a parol contract.

Deny that the p'ff was nor since the 4th day of Oct., 1881, or ever a partner in the said firm of Leigh, Payne & Co., or that he has entered into a contract or agreement with said Leigh, Payne & Co. that if they would sell the said lands for a larger sum of money than the price to be paid to the def'ts he, the said p'ff, was to be entitled to a share in all the profits or any of the profits to be made in any sale by the said Leigh, Payne & Co.

Wherefore p'ff prays as in his complaint, etc.

HILL & MAYS, WILLIAMS,
DURHAM & THOMPSON,
P'ff's Attorneys.

58 STATE OF OREGON, } ss:
Multnomah County, }

I, J. H. Fisk, the above-named plaintiff, being first duly sworn, say that the foregoing reply is true, as I verily believe.

J. H. FISK.

Subscribed and sworn to before me this 29th day of August, 1884.

WALLACE MONUK,
[SEAL.] *Notary Public for Oregon.*

59 [Endorsed:] In the circuit court of the State of Oregon for the county of Wasco. J. H. Fisk, p'ff, *vs.* D. V. B. Henarie *et al.* Reply to answer of Thomas J. Martin and J. Wil*xoc.* Filed September 1st, 1884. Geo. H. Thompson, clerk. Hill & Mays & Williams, Durham & Thompson, p'ff's att'ys.

60 In the Circuit Court of the State of Oregon for the County of Wasco.

J. H. FISK, P'ff, *vs.* D. V. B. HENARIE, PETER DONAHUE, ELEANOR Martin, T. S. Martin, Edward Martin, and John D. Wilcox, Def'ts.	Reply to Separate Answer of Edward Martin.

Plaintiff's Reply to the Separate Answer of Defendant Edward Martin.

For reply to the separate answer of def't Edward Martin, herein filed, pl'ff denies that he was deeply or at all interested with the said Leigh, Payne & Co. in affecting a sale of the said property.

Denies that he had an or any agreement with the said Leigh,

Payne & Co. that they were to pay him a large or any commission in case they should become the purchasers of the said property in the complaint described from the defendants.

Denies that he knew at the time he induced the defendants to enter into the said agreement with Leigh, Payne & Co. or
61 either of said agreements or ever that they were unable to purchase or to pay for the said property, or that they could only do so in case they should be able to resell the same to some other purchaser.

Denies that this pl'ff was interested with the said Leigh, Payne & Co. in endeavoring to find a purchaser from them for the said property upon or for a much or any larger consideration or price than they had agreed to pay the defendants for the same or at all.

That as to whether said Leigh, Payne & Co. could not procure a purchaser or purchasers for said property from themselves because they asked a much or any larger sum of money for the same than the said property was worth, or as to whether they could not find a purchaser therefor or purchasers from themselves or at all, he has no sufficient knowledge or information to form a belief.

That as to whether said Leigh, Payne & Co. were unable to pay said def'ts the said sum of $600,000 or the said sum of $615,000, not being able to resell or to sell said property, or because they
62 could not sell it, he has no sufficient knowledge or information to form a belief.

Denies that pl'ff was a member of the firm of Leigh, Payne & Co. in the agreement to purchase the said property from the defendants or at all or in any way, or that he was to share in any profits which might have been made by that firm in case they had been able to sell or dispose of said property at a profit or at all to any other person or persons.

Pl'ff denies that the contract in his complaint set forth was an oral contract or not in writing, but, on the contrary, avers that said contract was in writing and signed by one of said defendants, viz., D. B. V. Henarie, and that in so doing he acted for the other def'ts.

Pl'ff denies any knowledge or information as to why the said contract or modification thereof with said Leigh, Payne & Co. was never consummated.

Wherefore pl'ff prays as in his complaint.

HILL & MAYS & WILLIAMS,
DURHAM & THOMPSON, *Pl'ff's Att'y.*

63 STATE OF OREGON, }
Multnomah County, } *ss:*

I, J. H. Fisk, the above-named plaintiff, being duly sworn, say that the foregoing reply is true, as I verily believe.

J. H. FISK.

Subscribed and sworn to before me this 29th day of August, 1884.

WALLACE MOUNT,
[SEAL.] *Notary Public for Oregon.*

64 [Endorsed:] In the circuit court of the State of Oregon for Wasco county. J. H. Fisk, plaintiff, *vs.* D. V. B. Henarie, def'ts. Reply to answer of Edward Martin. Filed Sept. 1st, 1884. Geo. H. Thompson, clerk. Hill & Mays & Williams, Durham & Thompson, pl'ff's attorneys.

65 *Cost Bill.*

In the Circuit Court for the County of Multnomah, State of Oregon.

J. H. FISK, Plaintiff,
vs.
D. V. B. HENARIE, ELEANOR MARTIN, PETER DONAHUE, & Others, Defendants.

Statement of disbursements claimed in the above-entitled cause, viz:

Clerk's fees	$10 55
Sheriff's fees (serving subpœna)	1 05
Trial fees	12 00
Costs in lower court	
Advertising	
Depositions on commission, $100.00 & $15.00	115 00
Attorney's fees	10 00
Witness' fee, T. S. Martin, 1 day and mileage	2 40
Referee's fees	151 00
Disbursements	10 55
Total	$140 45

STATE OF OREGON, *County of Multnomah,* } *ss:*

I, James K. Kelly, being duly sworn, say I am the attorney for the defendants in the above-entitled cause; that the disbursements set forth above have been necessarily incurred in the prosecution of this suit, and that they are entitled to recover the same from the plaintiff.

JAMES K. KELLY.

Subscribed and sworn to before me this 15th day of April, A. D. 1885.

I. N. SANDERS, *Clerk.*

66 [Endorsed:] 4916. Circuit *couty* for Multnomah county, State of Oregon. J. H. Fisk, plaintiff, *vs.* D. V. B. Henarie, defendant. Bill of disbursements. Filed April 15, 1885. I. N. Sanders, clerk, by —— ——, deputy.

67 *Affidavit of W. Lair Hill.*

In the Circuit Court of the State of Oregon for the County of Wasco.

J. H. FISK, Pl'ff,
vs.
D. V. B. HENARIE, Def'ts.

STATE OF OREGON,
County of Wasco, } *ss:*

I, W. Lair Hill, being first sworn, say on my oath one of the very important witnesses of the plaintiff resides in Wasco county, Oregon.

W. LAIR HILL.

Subscribed and sworn to before me this — day of September, 1884.

GEO. H. THOMPSON, *Clerk.*

68 [Endorsed:] Fisk *vs.* D. V. B. Henarie *et al.* Affidavit of W. Lair Hill. Filed September 3rd, 1884. Geo. H. Thompson, clerk.

69 In the Circuit Court of the State of Oregon for the County of Wasco.

J. H. FISK, Plaintiff,
vs.
D. V. B. HENARIE, PETER DONAHUE, and Others, Defendants.

STATE OF OREGON,
County of Wasco, } *ss:*

I, James K. Kelly, being duly sworn, do say that I am the attorney of the defendants in the above-entitled action.

I further say that at the time when this action was commenced the plaintiff was and still is a resident of the city of Portland, in Multnomah county; that at the time of the commencement of this action the defendants J. D. Wilcox and Edward Martin, Thos. S. Martin were resident- of the said city of Portland; that said Thos. S. Martin is now a resident of East Portland, Oregon, and J. D. Wilcox is a resident of Portland; that the said Edward Martin is now a resident of San Francisco, California, and that all the other defendants were at the time of the commencement of this action and now are residents of the city of San Francisco, California. I further say that at the time this action was commenced neither the plaintiff nor any one of the defendants was a resident of the county of Wasco, in the State of Oregon. I further say that none of the witnesses of the defendants reside in Wasco county, but some of them reside in the city of Portland; some in San Francisco, California; one in Chicago, Ill., and one in England, and that it will

be more convenient for the witnesses who may be able to attend in person at the trial of this cause to attend at Portland, Oregon.

70 I further say that it is my belief that the witnesses of plaintiff can more conveniently attend the trial of this cause at Portland than at The Dalles. I further say that this motion is not made for the purposes of delay.

JAMES K. KELLY.

Subscribed and sworn to this 3rd day of September, 1884.

GEO. H. THOMPSON, *Clerk.*

Based on the foregoing affidavit, the defendants move the court to change the place of trial in this action to the circuit court of the State of Oregon for Multnomah county.

JAMES K. KELLY.

71 [Endorsed:] J. H. Fisk *vs.* D. V. B. Henarie, Peter Donahue, and others. Affidavit and motion to change place of trial. Filed September 3d, 1884. Geo. H. Thompson, clerk.

72 At a regular term of the hon. the circuit court of the State of Oregon for the county of Wasco begun and held at the court-house in Dalles city on the 17th day of March, A. D. 1884, at which were present the following officers:

Hon. A. S. Bennett, judge; John T. Storrs, sheriff; Geo. H. Knaggs, clerk.

And the following proceedings were had on Tuesday, the 18th day of March, A. D. 1884, the same being the second judicial day of said term, to wit:

Order.

A. FISK
vs.
D. V. B. HENARIE.

Now, on this day, this cause came on to be heard, the plaintiff appearing by Hill & Mays, and the def'ts appearing by Col. James Kelly, as counsellor and attorney; it appears by the argument that this cause will not be on trial this term.

73 At a regular term of the hon. the circuit court of the State of Oregon for the county of Wasco begun and held at the court-house, in The Dalles city on the first day of September, A. D. 1884, at which were present the following officers:

Hon. Frank J. Taylor, judge; James B. Crossen, sheriff; Geo. H. Thompson, clerk.

And the following proceeding was had on Tuesday, the 16th day of September, A. D. 1884, the same being the 14th judicial day of said term, to wit:

Order of Transfer.

J. H. FISK
vs.
D. V. B. HENARIE, PETER DONAHUE, ELEANOR MARTIN, and Others.

Now, on this day, it is ordered that the motion of the defendants heretofore filed for change of the place of trial in this cause be allowed, and it is ordered that this cause be sent for trial to the circuit court of the State of Oregon for Multnomah county on or before the 15th day of Oct. next.

74 STATE OF OREGON, *County of Wasco,* } *ss:*

I, Geo. H. Thompson, county clerk in and for said Wasco county, and *ex officio* clerk of the circuit court of the State of Oregon for Wasco county, do hereby certify that I have compared the foregoing with the original complaint, summons, answers, replies, affidavits, alias summons, motions, journal entry, and order, and that it is a true and correct transcript therefrom and of the whole of said original complaint, summons, answers, replies, affidavits, alias summons, motions, journal entry, order, or other pleadings filed in my office in the cause wherein J. H. Fisk is plaintiff and Daniel V. B. Henarie, Peter Donahue, Eleanor Martin, Thos. S. Martin, Edward Martin, and John D. Wilcox are defendants.

In witness whereof I have hereunto set my hand and affixed the seal of the above-entitled court this 11th day of October, A. D. 1884.

[SEAL.] GEO. H. THOMPSON, *Clerk.*

75 [Endorsed:] Filed Oct. 13th, 1884. I. N. Sanders, clerk.

76 Be it remembered that at a regular term of the circuit court of the State of Oregon for the county of Multnomah begun and held at the county court-house, in the city of Portland, in said county and State, on Monday, the 19th day of January, A. D. 1885, the same being the 3rd Monday in said month and the time fixed by law for holding a regular term of said court—Hon. Seneca Smith, judge, presiding in department No. —; whereupon, on this, Tuesday, the 14th day of April, A. D. 1885, the same being the 74th judicial day of said term of said court holden, among other proceedings, the following was had, to wit:

J. H. FISK, Plaintiff,
vs.
D. V. B. HENARIE *et al.*, Defendants. } 4916.

At this time this cause comes on for trial, the parties appearing, the plaintiff, by Mr. H. Y. Thompson, of counsel, and the defendants, by Mr. J. K. Kelly, of counsel. And now comes a jury as follows: James Beal, D. B. Stewart, G. R. Sharp, F. P. Hall, A. Smith, David

H. Harrell, Samuel Butchel, J. S. Royal, Geo. W. Elmer, L. H. Parsons, William Roberts, and John Epperly, good and lawful men, duly summoned, empaneled and sworn, and after hearing the allegations of the parties and a portion of the testimony the jury, with the usual admonition of the court, are discharged from further consideration of the case until to-morrow morning at 9 o'clock.

(Signed) SENECA SMITH, *Judge.*

77 Be it remembered that at a regular term of the circuit court of the State of Oregon for the county of Multnomah begun and held at the county court-house, in the city of Portland, in said county and State, on Monday, the 19th day of January, A. D. 1885, the same being the 3rd Monday in said month and the time fixed by law for holding a regular term of said court—Hon. Seneca Smith, judge, presiding in department No. —; whereupon, on this, Wednesday, the 15th day of April, A. D. 1885, the same being the 75th judicial day of said term of said court holden, among other proceedings, the following was had, to wit:

Order.

JAMES H. FISK, Plaintiff,
vs.
DANIEL V. B. HENARIE, PETER DONAHUE, ELEANOR MARTIN, Thomas S. Martin, Edward Martin, and John D. Wilcox, Defendants.

At this time this cause comes on for trial, the parties appearing, the plaintiff by Messrs. Williams, Durham, and Thompson, and the defendants by Mr. James K. Kelly, and the jury as on yesterday. After hearing the remainder of the testimony on behalf of the plaintiff the jury, without retiring, are instructed by the court to render the following verdict in writing; which verdict reads as follows:

We, the jury in the above-entitled action, find for defendants.

(Signed) JOHN EPPERLY, *Foreman.*

Whereupon the jury are discharged from further consideration in the case and plaintiff is allowed twenty days to file bill of exceptions.

(Signed) SENECA SMITH, *Judge.*

78 Circuit Court of the State of Oregon for Multnomah County.

J. H. FISK
vs.
D. V. B. HENARIE *et al.*

To the above-named defendants and to James K. Kelly, attorney for defendants:

You are hereby notified and required to produce at the trial of the above-entitled action, so that the same may be used in evidence at said trial, the following described papers, to wit:

Power of att'y from Thos. S. Martin to D. V. B. Henarie.
" " Edward Martin " "
" " J. D. Wilcox " "
Letter of J. H. Fisk, dated Nov. 28th, 1880, to D. V. B. Henarie.
" " " Jan. 18th, 1881, " "
" " " Feb. 14th, 1881, " "
" " " March 7th, 1881, " "
" " " " 11th, 1881, " "
" " " " 14th, 1881, " "
" " " July 29th, 1881, " "
" " " " 30th, 1881, " "
" " " Nov. 9th, 1881, " "
" " " Dec. 8th, 1882, " "

And in default of such productions the pl'ff will claim the
79 right to prove the contents of each of said papers not produced.

H. Y. THOMPSON,
Attorney for Plaintiff.

I hereby accept service of the foregoing demand and notice and acknowledge the receipt of a copy thereof, at Portland, this 12th day of March, 1885.

JAMES K. KELLY,
Attorney for Defendants.

80 [Endorsed:] Exhibit "A." No. 4916. In the circuit court of the State of Oregon for Multnomah county. J. H. Fisk, plaintiff, *vs.* Henarie *et al.*, defendants. Notice to defendants to produce papers. Filed April 15th, 1885. J. N. Sanders, clerk, by Milton Weidler, deputy. Williams, Durham and Thompson, attorneys for plaintiff.

81 In the Circuit Court of the State of Oregon for Multnomah County.

JAMES H. FISK, Plaintiff,
vs.
DANIEL V. B. HENARIE, PETER DONAHUE, ELEANOR MARTIN, T. S. MARTIN, EDWARD MARTIN, and J. D. WILCOX, Def'ts.

We, the jury in the above-entitled action, find for the defenants.

JOHN EPPERLY, *Foreman.*

20 days to file bill of exceptions.

82 [Endorsed:] Fisk *vs.* Henarie, *et al.* Verdict. Filed April 15th, 1885. I. N. Sanders, clerk, by Milton Weidler, deputy.

Motion to Set Aside Verdict for a New Trial.

83 In the Circuit Court of the State of Oregon for the county of Multnomah.

J. H. FISK, Plaintiff,
vs.
D. V. B. HENARIE *et al.*, Defendants.

Now comes the plaintiff and moves the court for an order:
1st. Setting aside the verdict rendered in the above-entitled cause, and—
2nd. Granting a new trial of the said action for the following reasons, to wit:
1st. The said verdict is not supported by the evidence.
2nd. The said verdict is against the law; and—
3rd. Errors of law occurring at the trial and duly excepted to by the plaintiff at the time.

WILLIAMS, DURHAM & THOMPSON,
Att'ys for Pl'ff.

I hereby acknowledge due service of the foregoing motion at Portland the 16th day of April, 1885.

JAMES K. KELLY,
Att'y for Def'ts.

84 [Endorsed:] Circuit court, State of Oregon, for Multnomah county. J. H. Fisk *vs.* D. V. B. Henarie *et al.* Motion for new trial. Filed April 17th, 1885. I. N. Sanders, clerk, by Milton Weidler, deputy. Williams, Durham & Thompson, attorneys for plaintiff.

85 Be it remembered that at a regular term of the circuit court of the State of Oregon for the county of Multnomah, begun and held at the county court-house, in the city of Portland, in said county and State, on Monday, the 19th day of January, A. D. 1885, the same being the 3rd Monday in said month and the time fixed by law for holding a regular term of said court—Hon. Seneca Smith, judge, presiding in department No. —; —whereupon, on this Friday, the 17th day of April, A. D. 1885, the same being the 77th judicial day of said term of said court holden, among other proceedings the following was had, to wit:

Order.

J. H. FISK, Plaintiff,
vs.
D. V. B. HENARIE *et al.*, Defendants. } 4916.

Now, this day, the motion of plaintiff for a new trial having been overruled and the defendant having filed a motion for judgment upon the verdict, it is ordered and adjudged by the court that the

defendants have and recover of the plaintiff their costs and disbursements, to be taxed, and that execution issue therefor.

(Signed) SENECE SMITH, *Judge.*

86 *Stipulation Extending Term of Filing Bill of Exceptions.*

Circuit Court, State of Oregon, for Multnomah County.

J. H. FISK
vs.
D. V. B. HENARIE *et al.*

It is hereby agreed that the time for presenting the bill of exceptions may be extended to May 15th, 1885.

H. Y. THOMPSON,
Att'y for Pl'ff.
JAMES K. KELLY,
Att'y for Def'ts.

87 [Endorsed:] 4916. Circuit court of the State of Oregon for Multnomah county. J. H. Fisk *vs.* D. V. B. Henarie *et al.* Stipulation extending time for filing bills of exceptions. Filed May 2nd, 1885. I. N. Sanders, clerk, by Milton Weidler, deputy.

88 *Bill of Exceptions.*

In the Circuit Court of the State of Oregon for the County of Multnomah.

J. H. FISK, Plaintiff,
vs.
D. V. B. HENARIE, PETER DONAHUE, ELEANOR MARTIN, Thomas S. Martin, Edward Martin, John D. Wilcox, Defendants. } Bill of Exceptions.

On the 14th day of April, 1885, the above-entitled action came on for trial, H. Y. Thompson appearing for the plaintiff and James K. Kelly appearing for the defendants, and a jury of good and lawful men having been duly empanelled and sworn according to law, and the attorneys for the respective parties having stated the case to the jury, the plaintiff, to maintain the issues upon his part, offered in evidence the following testimony, to wit:

The plaintiff, without objection, read to the jury from the deposition of the defendant D. V. B. HENARIE as follows:

Interrogatory 1. Are you a defendant in the above-entitled action in which James H. Fisk is plaintiff and D. V. B. Henarie and others are defendants?

Ans. Yes.

Interrogatory 2. Where do you now reside and how long
89 have you resided there?

Ans. San Francisco; over thirty years.

Int. 3. Are you acquainted with the plaintiff, James H. Fisk; if

so, how long have you known him and where did you first become acquainted with him?

Ans. I am acquainted with him and have been for about four years. I made his acquaintance in San Francisco. I first knew him in connection with his inquiries of me about the land in respect to which he claims a broker's fee in this case.

Int. 4. Have you any interest in what is known as The Dalles Military Road Company lands situated in Wasco, Grant, and Baker counties, in the State of Oregon? If you have, state the nature of that interest and where you acquired it and who were the owners thereof in the early part of the year 1881.

Ans. I have an interest of one-quarter (¼) in these lands acquired in 1875 by me. In the early part of the year 1881 the owners of those lands were the estate of Edward Martin, deceased, and myself.

Int. 5. Did you in connection with any other persons ever make an agreement by which you employed the plaintiff, James H. Fisk, to act as your agent or broker to sell said lands; if you did
90 so employ him when was that contract made, where was it made, and who all were parties to it?

Ans. I never did, either by myself or in connection with any other persons, employ plaintiff. I merely gave him the price at which I and the other owners of the said lands were willing to sell them, with the promise and offer that if he could effect the sale of them at the price of one dollar an acre out of the money received of said sale we would pay him ten per cent. commission; but no money was to be paid him except out of the proceeds of the sale effected by him. It was understood that this proposition, which plaintiff accepted, was in no way to interfere with our selling the lands to other parties if we could without his help, in which case he was to receive no commission. If that proposition and its acceptance constituted a contract or agreement it was made in San Francisco, California, in or about the month of October, 1880, and plaintiff was employed then as agent or broker to make the sale of the lands whenever he could on the conditions I have mentioned. The parties to it were the owners of the land, myself, and the Edward Martin estate, represented by Mrs. Eleanor Martin, administratrix, on the one part and plaintiff on the other part.

91 No other contract or agreement with plaintiff or proposition and acceptance was ever made by us or the parties—plaintiff and defendant.

Int. 6. Was that contract reduced to writing or was it a parol contract?

Ans. The proposition I have stated, which was an offer as before mentioned, was by parol. It was not reduced to writing. There was no written contract.

Int. 7. State the terms and conditions of that contract made with James H. Fisk as fully as you can, if such contract was oral. If in writing please attach the contract or a copy thereof to your deposition.

Ans. The terms and conditions of the proposition or offer which

I have stated and upon the performance of which the plaintiff undertook to enter were such as I have already mentioned in my answer to interrogatory No. 5. All that passed between me and plaintiff was oral, and there was no written agreement.

The plaintiff, to further maintain the issue upon his part, called the plaintiff, JAMES H. FISK, as a witness, who testified that he lives in Portland, Oregon; is an assayer by profession, and in the years 1880, '1, '2, '3 was engaged in negotiating sales of land; knew the defendants in fall of 1880, and at that time talked with them in San Francisco, California, about the lands in question.

The witness was then asked the following questions:

State what conversation you had and what, if any, agreement was made between you and the defendants in relation to your procuring a purchaser for the lands described in the complaint, and what, if any, commission you were to have therefor.

To which said questions the defendants objected on the ground that the same is incompetent and immaterial; which said
92 objections the court then and there sustained and ruled that the said question should not be answered; to which holding and ruling of the court the plaintiff then and there duly excepted.

The plaintiff, to further maintain the issues upon his part, submitted to the witness for examination all of the papers hereinafter mentioned and proved the same by the witness, and it was admitted by the defendant that the said papers and each of them was in the handwriting of and subscribed by the parties by whom they purport to have been written and subscribed.

The plaintiff then offered in evidence each of the following papers, to wit:

1. A letter of pl'ff to def't Henarie, dated Nov. 28th, 1880.
2. A letter of Henarie to plaintiff, dated Dec. 7th, 1880.
3. A letter of plaintiff to Henarie, dated Jan. 18th, 1881.
4. A letter of Henarie to plaintiff, dated Jan. 29th, 1881.
5. A letter of plaintiff to Henarie, dated Feb. 14th, 1881.
6. A letter of Henarie to plaintiff, dated Feb. 25th, 1881.
7. A letter of plaintiff to Henarie, dated Mar. 11th, 1881.
8. A letter of plaintiff to Henarie, dated Mar. 14th, 1881.
9. A letter of Henarie to plaintiff, dated Mar. 15th, 1881.
10. A letter of Henarie to plaintiff, dated Mar. 23rd, 1881.
11. A letter of plaintiff to Henarie, dated Mar. 27th, 1881.
12. A letter of plaintiff to Henarie, dated July 13th, 1881.
13. A letter of Henarie to plaintiff, dated July 21st, 1881.
14. A letter of plaintiff to Henarie, dated July 29th, 1881.
15. A letter of Henarie to plaintiff, dated Aug. 5th, 1881.
16. A letter of plaintiff to Henarie, dated Dec. 8th, 1882.
17. A letter of plaintiff to Henarie, dated Feb. 7th, 1881.

The said letters above referred to were each objected to as
93 they were offered upon the grounds of incompetency and immateriality. The court having examined all of the said letters held that they did not contain evidence of the contract mentioned in the complaint and sustained the said objections to each of

the said letters and refused to allow the same or any of them to be read in evidence; to which holding of the court and exclusion of the said letters and each of them the plaintiff then and there duly excepted.

Copies of the said letters are hereunto annexed, marked respectively Exhibits A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, and Q, and are made a part of this bill of exceptions.

At the time of offering the said letters in evidence as aforesaid the plaintiff accompanied said offer with the promise and proposition on the part of plaintiff to introduce evidence showing that the defendant Henarie was the duly authorized agent of the defendants; that plaintiff entered upon the work of procuring a purchaser for the said lands on the terms proposed, and that he did procure a purchaser on said terms, who was willing and able to purchase said lands, and that the said purchaser was accepted by the defendants as such, and that the defendants and said purchaser entered into written contracts for the sale of said lands to the said purchaser, and that plaintiff fully complied with all the conditions of his contract with the defendants. The plaintiff then asked the following questions, to wit:

After you received the letter of Dec. 7th, 1880, what, if anything, did you do about going to work under the proposition contained in that letter?

The defendants objected on the ground that it is immaterial, and the court sustained the said objection and refused to allow the witness to answer; to which said ruling of the court and refusal to allow the witness to answer the plaintiff then and there
94 duly excepted.

Said witness was then asked: State whether or not the proposition contained in the letter of Dec. 7th, 1880, was at any time withdrawn by any of the defendants. To which question the def'ts objected that the same is immaterial. The court sustained the said objection and declined to allow the witness to answer; to which said ruling of the court the plaintiff then and there duly excepted.

The witness was then asked: State whether or not you gave Mr. Henarie any information concerning what you were doing under the proposition of Dec. 7th, 1880. And, if so, what information did you give him upon that subject?

The def'ts objected on the ground that the said question is immaterial, and the court sustained the said objection and declined to allow the witness to answer; to which said ruling of the court the plaintiff then and there duly excepted.

The witness was then asked: State when you gave him such information and how. The def'ts objected on the ground that the same is immaterial. The court sustained the said objection and declined to allow the witness to answer the said question; to which said ruling of the court the plaintiff then and there duly excepted.

The witness was then asked: You may state what you did, if anything, toward procuring the firm of Leigh, Payne & Co. to become purchasers of the lands described in the complaint. To which question the def'ts objected that the same is immaterial. The court

sustained the objection and declined to allow the witness to answer; to which said ruling of the court the plaintiff then and there duly excepted.

95 The witness was then asked: State if you know whether Leigh, Payne & Co. entered into any contract with the defendants for the purchase of the lands in question. To which said question the def'ts objected that it is immaterial. The court sustained the said objection and declined to allow the witness to answer; to which said ruling of the court the plaintiff then and there duly excepted.

The witness was then asked: State what you did, if anything, in relation to bringing Mr. Leigh, of the firm of Leigh, Payne & Co., and the def'ts together. The def'ts objected that it is immaterial, and the court sustained the said objection and declined to allow the witness to answer; to which ruling of the court the plaintiff then and there duly excepted.

The plaintiff then offered in evidence a written contract entered into between Leigh, Payne & Co. and the def'ts, dated July 21, 1881, for the purchase by Leigh, Payne & Co. of the lands described in the complaint for the sum of $600,000.00, and a modification of said contract dated Oct. 4, 1881, in which the purchase price is stated to be $615,000.00; to the introduction of each of which said contracts the defendants objected on the ground of incompetency and immateriality, and the court sustained the said objections and declined to receive said papers in evidence; to which said rulings of the court the plaintiff then and there duly excepted.

The witness, J. H. Fisk, was then asked: State, if you know, what the financial ability of Leigh, Payne & Co. was and is to comply with the terms of the contract of purchase made by them. To which question the def'ts objected on the grounds that the same is immaterial; which said objection was sustained by the court and the witness was not allowed to answer; to which ruling of the court the pl'ff then and there excepted.

96 The witness was then asked: State what you did with reference to procuring Robert Bell to become a purchaser of the lands described in the complaint on the terms contained in the letter of Dec. 7, 1880.

The witness was then asked: State whether or not Mr. Bell was accepted as a purchaser by the defendants.

The written proposition made by Mr. Bell and claimed to have been accepted by the defendants was submitted to the witness, proved, and offered in evidence, and the witness was asked to state whether the $10,000 mentioned in this proposition was paid to the defendants.

The witness was then asked to state if he knew what was the financial ability of Mr. Bell to comply with the said terms of purchase. The witness was then asked the following question: State whether or not in the matter of procuring Leigh, Payne & Co. and Robert Bell to become purchasers of the lands described in the complaint you were acting under the authority of the letter of Dec. 7,

1880; and, if so, what, if any, knowledge did the defendants have that you were so acting?

To each of the foregoing questions the defendants objected that it was immaterial. The court sustained the objection and excluded the evidence; to which said ruling of the court the def't- then and there duly excepted.

The court, in passing upon the objections made to the introduction of the evidence of the plaintiff as hereinbefore stated, being of the opinion that the said evidence was not competent or sufficient to prove the contract set forth in the pleadings of the pl'ff, — then asked leave of the court to amend his complaint by substi-
97 tuting $450,000.00 for and instead of $600,000.00 as the amount for which said lands were to be sold by plaintiff, but the said application of the plaintiff was denied by the court, and the plaintiff was not allowed to amend.

Whereupon, the plaintiff having announced to the court that he had no further evidence to offer, the court, upon the motion of the defendants, instructed the jury to return a verdict for the defendants, and such verdict was accordingly returned.

Presented, allowed, and settled this 8th day of May, 1885.

SENECA SMITH, *Judge.*

The foregoing statement is correct.
May 5th, 1885.

JAMES K. KELLY,
Attorney for Defendant-.

98 EXHIBIT "A."

"NEW LONDON, CONN., *Nov. 28th*, 1880.

Mr. Dan. Henarie.

DEAR SIR: I have been prospecting here some time in regard to your land grant, and find money very plenty and many anxious to take hold of something of that kind, either in bonds or the whole thing, and form a syndicate themselves.

I have not the least doubt but what I could dispose of the whole thing on your own terms in one lump if I had the disposal of it.

I had a conversation with Mr. H. H. Anderson, cashier of a German savings bank of Davenport, Iowa, whose card I herewith enclose, who informs me that he would take one hundred thousand dollars ($100,000) of it, and that he could easily raise the whole amount.

In that case he would first send a man out to go over the road and look at it. The party he would select for that purpose I am well acquainted with, and could influence his report very easily, if necessary.

Mr. Tilton has just returned to New York; says he called
99 at your store to see you, but you were not in; says he learned, however, that some of the heirs' interest had been disposed of, which may complicate matters in disposing of it. But if you can get it into shape and allow me to handle it on a commis-

sion I am confident I could dispose of it to your entire satisfaction as well as myself.

I would be pleased to hear from you on this matter. Direct to New London, Conn.

Very respectfully yours,

(S'g'd) J. F. FISK."

100 EXHIBIT "B."

SAN FRANCISCO, *Dec. 7th*, 1880.

Mr. J. H. Fisk.

DEAR SIR: Your favor of Nov. 28th has been received and contents noticed, and in answer I will say, first, that none of the heirs have sold out. There has been none sold since Mr. Martin's death. There are 600,000 acres to be sold in a lump.

There is a very influential party East that now have the land for sale, and they feel very confident of effecting a sale, but they have it for no stated time. Consequently we have liberty to accept the first offer made at the price set, $1.00 per acre, 10 per cent. off com's'n. We should be very glad if you could make the sale.

The lands are so very low and so well known I think you might make a quick sale of them.

We are prepared at short notice to give a good title without having an administration appointed in Oregon.

There are no debts in Oregon; hence the heirs can sign and the minors by guardian, under direction of the probate court.

101 The whole proceedings can be gone through with in a short time.

I have not offered my undivided quarter interest separately as yet, thinking, perhaps, it might hinder the sale of the whole.

I regret I did not meet with Mr. Tilton when he passed through the city; should like to have had a talk with him.

I think the railroad parties could make more out of these lands than any other party.

I am anxious to have the lands sold, in order to close up our interests in Oregon and for other private reasons, and if you can do it I shall be happy.

Yours truly,

(S'g'd) D. V. B. HENARIE.

102 EXHIBIT "C."

NEW LONDON, CONN., *Jan. 18th*, 1881.

D. V. B. Henarie.

DEAR SIR: Since writing your last I have been canvassing the land matter pretty thoroughly, and think as direct offer I can get $420,000, or sufficient to pay commissions over the $400,000, as it will net you that amount clear.

If I understood you correctly, you told me you would be willing to take $100,000 for your one-fourth interest.

Now, if you can get the other heirs to take the same I think I can drive a trade at once, or if you will join Mr. Tilton and myself we can get up a Co. and get more, but it would take a longer time and slower work. Any one purchasing this grant in one lump must have a margin for profit to work it off in stock and bonds, and any one purchasing at $1.00 per acre can have no living show for a profit for many years to come.

Hoping to hear from you soon, I remain, very respectfully yours,

(S'g'd) J. H. FISH.

103 EXHIBIT "D."

SAN FRANCISCO, *Jan'y* 29, 1881.

Mr. J. H. Fisk.

DEAR SIR: Your favor of the 18th inst. was duly received and contents noted.

We are just now in treaty with a party that has had the matter in hand for a long time at a much higher figure than you name. Therefore I am not prepared to treat with you at present. Should this not amount to anything and should we conclude to take the amount you name I will write you. In the meantime if you and Mr. Tilton will make an offer for it I will bring it forward at the proper time, and perhaps it would be accepted.

Yours truly,

(S'g'd) D. V. B. HENARIE.

104 EXHIBIT "E."

NEW LONDON, CT., *Feb'y* 14, 1880.

D. V. B. Henarie.

DEAR SIR: Your letter of Jan. 29 is just received and contents noted.

I have just returned from a trip out in Pennsylvania, and my reason for telegraphing you from Williamsport was at the request of a friend of mine in Philadelphia, who is a very heavy operator in lands. He was very anxious to know what he could get it for before purchasing a tract in Kansas, but he would not pay anything like $1.00 per acre. Mr. Tilton would not make any other offer for it, and would only assist me in making a sale or in placing bonds for what he could make out of it.

Mr. Villard would not pay as much for it now as he would two months ago. He is in communication with D. P. Thompson, who was chief engineer in building the road, and at present mayor of Portland.

It was through him that Cartwright made you the offer of $150,000 for Villard, and (I know) Thompson puts a very low valuation on the lands. I have two parties who would send out experts and examine the lands, and would purchase on their report; but I
105 should be afraid to have them do so from my knowledge of the land, and consider it the safest and best way to realize the $400,000.00 for you to let some one organize a Co. of influential

men. Take in such men as Thompson, Tilton, and those German bankers, who would make favorable reports and be influential in disposing of the bonds, and have them pay you something for the bond for six months if you think best. This may be Mr. Dothet's idea in a measure, but he has not got hold of the right men to succeed. He is trying to get Lenhard & Sheldon, of Wall St., to take hold of it. If Lenhard does take hold of it he can put it through, but I am confident he will not touch it for any larger sum than $250,000.00; and when you speak of any one handling it for a larger sum than $400,000.00 I will venture the assertion it can't be done, and I doubt very much if $400,000 can be realized for it in New York; in fact, I consider the market spoiled for it in New York, and I hope Mr. Dothet will confine himself to New York and not take it to Boston or Philadelphia. Besides, Mr. Dothet has too many "irons in the fire" to be successful. He has 125,000 acres of land in Arizona and several silver mines in Tombstone district to dispose of.

106 I have not spoken to him in the matter, but have heard him offering and trying to negotiate the Arizona property.

This land of yours is a big thing to handle, and any one having it should give it his attention; but as you are not ready to treat with me I will let the matter rest and give the other party ample —, and when they get entirely through I will sell it for you if you will give me a show at it, for, as I told you, it was damaging to have two at work at it at the same time. In the meantime I will not speak of it less than $1.00 per acre, and if I get an offer that I think you would accept of will let you know.

But could I go to work and get up a Co. I could then make you an offer that would be binding.

Hoping to hear from you soon, I remain,

Very respectfully yours,

(Signed) J. H. FISK.

107 EXHIBIT "F."

SAN FRANCISCO, *Feb'y* 24, 1881.

Mr. J. H. Fisk, New London.

DEAR SIR: Your favor of the 14 has been received, and I am much pleased at what you say about the Oregon lands. When I received your dispatch I prevailed, with some difficulty, on Mrs. Martin to allow me to offer the lands to you for $450,000 in consideration of a quick sale. You have that offer now, and I should think you could make sale of them at that price without much difficulty. This is the only offer that has been made to any party for less than one dollar per acre, 10 % commisson off, and in my opinion the only one that will be made, as they all consider that a very low price for them. Now, as to my own undivided interest in the lands, if you can get me a cash offer of the amount I intimated to you when here that I might accept.

I will close it out, as I am anxious to get my partnership matters

closed as soon as possible and retire. I think this last proposition is worth your serious consideration. I should be pleased to hear from you again soon in regard to this whole matter, and if anything turns up of interest in regards to the lands here I will write you.

Yours truly,
(Signed) D. V. B. HENARIE.

108 EXHIBIT "G."

NEW LONDON, CONN., *March* 11, 1881.

D. V. B. Henarie.

DEAR SIR: Yours of F'*b*y 25th is just received and contents noted.

I am very sorry I did not have authority to negotiate these lands at the time I telegraphed you, as I am confident that I could have closed a sale on the terms you now offer to a man who you well know is a great operator—Jay Coaks, of Philadelphia. I doubt if I can do so now on account of his investments in other quarters. I have an appointment with other parties I shall meet in Boston next week, and I think I may effect some terms with them; but to do so I may ask of you the refusal of it for 60 days to give a certain party in Oregon time to look at it and report; if so, will want to be there to go with him.

I also have a party of Germans out West who want to examine it with a view of purchasing, but I much prefer closing the trade without any examinations, for reasons I have before stated to you.

In the meantime if Mr. Fowler, of Boston, or any one else
109 addresses you in regard to the matter or the price don't intimate that it can be had at anything less than $1.00 per acre.

This thing must be managed very carefully. Say not a word to any one about a commission whatever, as this will be an important matter in making a sale and must be covered up deep until I see you; then I will explain more particularly. I will try and get into as good a shape as I can in the limited time I remain East so when I come back next month we will be able to fix something definite.

I will have a party here who will look after this end of the matter. I have no fears of Dothet and Robbins doing anything with it in New York by opening an office and "retailing" to every one that comes in. To make a sale of this nature a man must not be afraid of spending a little, must be posted and do lots of hard work and know his men. I will let you hear from me time to time how I get on, and all — is necessary to make a thing of this kind go is to get the right — of men hold of it.

Yours very respectfully,
(Signed) J. H. FISK.

110 EXHIBIT "H."

BOSTON, *March* 14, 1881.

D. V. B. Henarie.

DEAR SIR: I telegraphed you to-day not to write or telegraph

the price of your land to any one less than $1.00 per acre. For — it gets out and generally known that we are getting the land for less than $1.00 per acre we can't dispose of our bonds at all, and the result will be that no one will touch it.

Fowler says he has telegraphed out there and has got the price at 75 cts. I do not know whether he telegraphed you or Mr. Lillie, or who, but if you want to sell the land it must be stopped. If I can't sell it there can't anybody., There will undoubtedly several write you, but just say to them that the price is $1.00 per acre and that you don't care whether you sell or not.

I have got two in with me now on the commission. Now, if I take Fowler in there will be four. It makes the commission so small that they fail to take interest in it.

It can't be forced on to anybody; it must — so managed as to make people think we are conferring a favor on them to let them have any of it at all. In haste.

Respectfully yours,

(S'g'd) J. H. FISK.

111 SAN FRANCISCO, *March 15th*, 1881.

Mr. J. H. Fisk, New London.

DEAR SIR: Yours of the 7th inst. has been received, and in reply will say Mr. Lillie has no interest in the land; was merely a clerk in our land office and had no authority to make such or any other statement in regard to it. I am inclined to think Mr. Fowler is mistaken, as it has never been offered to anybody for less than $1.00 per acre by either Mrs. Martin or myself, and no one else has any authority in the matter.

I trust you will be able to make the sale, as you have the best show.

Yours truly, D. V. B. HENARIE.

Exhibit "I."

112 SAN FRANCISCO, *March 23rd*, 1881.

Mr. J. H. Fisk.

DEAR SIR: Your favor of the 11 and 14 have been received. Lillie received a letter from Fowler last week and says he answered him that we had authorized you to sell it at $1.0- per acre. He says that Fowler asked him about the lands and if he thought it was a good thing, and sent him a circular & told him he believed the description was correct and that he thought that it was a good operation. Now, I don't know much about Lillie and cannot say whether he or Fowler lies, but I told Lillie that we should not consent to sell it to anybody for less than $1.00 nett; that we did not care whether we sold it or not. My opinion is that you will be the one to sell it. I have no faith that the New York parties will amount to anything. I shall favor you all I can and endeavor to make the sale through you. I will see that there is no offers made to any other parties if I can help it; certainly at not less than $1.00 nett.

Yours truly, D. V. B. HENARIE.

Exhibit "J."

113 EXHIBIT "K."

NEW LONDON, *March 27th*, 1881.

D. V. B. Henarie.

DEAR SIR: As soon as I received your letter authorizing me to sell at $450,000 I went to Boston with the intention of working up a Co. to buy the land, and got it well under way; but in the meantime I got in with R. M. Pomeroy, pres't of Atchison, Colorado & Pacific R. R. Through him I worked on Oak Ames, president of Central Pacific R. R., and, as the matter had been presented to him before, it was hard to get a hearing; but now I think I have got him fixed. These fellows all want a slice of all there is to be made, and it takes money to fix them, and now I expect it will take $10,000 more to carry the thing through in order to get anything myself. I have had to write out a lengthy report on the whole history of the road and land grant and put it in shape to be presented to the board of directors.

The coming week it will come formally before the executive committee of the board of directors, and think it will meet with their approval. If so, it will then come formally before the board of directors at their next meeting; then, unless Jay Gould or Sidney Dillon strongly objected, it will go through all O K. My strong point is in controlling this executive committee, which I think I have done. I have had to handle these fellows carefully. One does not know the manner I have dealt with the others, therefore you will see the necessity of your being careful how you reply to any inquiry made of you by any one, for a little publicity might upset the whole thing. Say nothing about it to Tilton. He is not with me in this deal. I wanted him to go to Boston and help
114 me get up a company, but he backed out, owing to pressure of business. He is always ready to come in at the end and take his share of commission, but in this case he is out. There is no one knows anything about the matter but you and myself and the parties immediately interested in Boston. If it goes through all O K there will be some one appointed to purchase it, which is most likely to be R. M. Pomeroy, as he will in any event leave Boston in a special car with his family on the first day of May for San Francisco on a pleasure trip, and I have fixed him solid. I can't say now what hitch there may be in the sale, but, to say the least, it looks very encouraging.

I can go ahead and get up the Co. in Boston and purchase it, but it will take some time, and, as this trade with the C. P. Co. looks so favorable, I will delay the company movement to see the result of this; and, in the meantime, I will take a flying trip to Oregon and look after some of my matter there, and in case of any failure with the C. P. Co. I will return here and go ahead with the company. There is no trouble in my selling the property; it is only a questi-n of time, and am sorry to start in just as I want to leave, but will do the best I can as long as I remain, and get it in as good a shape as

possible. I will leave here before Pomeroy does, but will meet him in San Francisco.

I remain very respectfully yours,

(S'g'd) J. H. FISK.

Exhibit "K."

115 EXHIBIT "L."

245 WABASH AVENUE, CHICAGO, *July* 13, 1881.

D. V. B. Henarie.

DEAR SIR: There are four different parties here who are anxious to purchase copper mines, one in Chicago, one in Boston, and two in Conn.—all large brass foundry men. They say they cannot depend upon the price of copper; that when they have figured upon a contract that some government is liable to come in and purchase a large amount for cartridges, caps, & etc., which will send the price of copper up so that it is ruinous for them to fulfill their engagements, and that they must own their own mines, and one that will produce a certain amount of copper per annum. They will pay a good price for it. I think you had better look after your mines, for they are worth money. Leigh is very anxious to learn soon whether you and Mrs. Martin will agree to the contract. He has had several Englishmen talking with me about it, and as soon as it is settled he will have them all writing to their friends in Europe to invest in it.

It is not material whether the price is 120,000 pounds or 125,000 pounds; but, after talking and thinking the matter over, I think Leigh's partner would be more liable to put the money up for the first payment (which they expect him to do) if left as it is. They have such encouraging reports from London they think the money will be put up before Nov. 1st. I had a talk here yesterday with Villard, and spoke of this land casually. He would not give it a thought since his consolidation with the North Pacific R. R. They have more land than they can dispose of for the next twenty years; besides, they lap onto this some 40 miles south from The Dalles. I regard this Englishman's offer much better than any other, and fully as quick, if not quicker, payment, and I think the
116 quicker we get them to work on it the quicker we will get the money. They will have a good deal to do to put the thing in shape, and so have I, and want to get back to 'Frisco as soon as I can after this is fixed up.

I remain respectfully yours,

(S'n'd) J. H. FISK.

Exhibit "L."

117 EXHIBIT "M."

SAN FRANCISCO, *July* 21*st*, 1881.

Mr. J. H. Fisk.

DEAR SIR: We have about concluded to accept Lee, Payne & Co.'s

offer and will sign such a contract as will suit us and we think will suit Mr. Leigh. But in order to furnish you a valid one will involve a trip to Oregon of our att'y and, perhaps, myself, which will take some days, but will be in time for the fall campaign. There will be some alterations in it, but we think it will not be objectionable to any of you. We will endeavor, if possible, to start for Oregon next Tuesday or Wednesday, and will force matters as fast as possible and fix it at the same time so that we can give title at once.

This is the present intention and I trust there will be no slip on it. I will advise as we progress.

Yours truly,

(S'g'd) D. V. B. HENARIE.

118 EXHIBIT "N."

243 STATE STREET, CHICAGO, *July 29th*, 1881.

D. V. B. Henarie.

DEAR SIR: Yours of 21 inst. is received and contents noted. I hope you will get the matter all straightened up and forward paper to me as soon as possible.

I wanted to get back to 'Frisco by the 25th of Aug. if I could, for I have much to do there to get what certificates I want to forward to London. I have met many Englishmen here on their way to Europe. All think well of it and say the way times are there now those debenture bonds would all be taken in a week and nothing but a financial crash would prevent it. Leigh, Payne & Co. are much pleased at the prospect of your acceptance of the contract and hope there will be no detrimental change in it.

I herewith enclose a paper which I wish you and Mrs. Martin to sign and forward to me, or something to that effect, as I have got to fix Griggs & Coolidy; have got to give them a paper or something that will be satisfactory to them. They have been of much help to me. Houtz, of Philadelphia, was here yesterday and tryed to bu-st in and get a portion of the commission, but we soon played him out on that when I showed him his highest offer was only $300,000 when he was trying to negotiate it at $600,000. I want to fix everything satisfactory with all parties before I leave here, so there will be no misunderstanding or trouble afterwards. Please write me often and let me know how soon you think you can get matters in shape.

I remain respectfully yours, J. H. FISK.

P. S.—I have changed my quarters to 243 State street, Chicago.

119 EXHIBIT "O."

SAN FRANCISCO, *August 5th*, 1881.

Mr. J. H. Fisk.

DEAR SIR: Yours of the 29 & 30 has been received. I have not been able to induce Mrs. Martin to make a move in regard to the lands as yet on account of other pressing business she has on hand,

but hope to soon as I expect that in hand now will be closed early next week. I became very much disgusted at the delay last week, hence my telegram to you about my individual interest.

If I find there can be nothing done soon with the whole, why cannot you make a sale to these same parties of my interest for cash at the sum named to you when here? They would certainly do better than by taking to the whole, and you may make nearly as much as you would on the whole. My object is to get settled up and be free of them altogether. What I would lose on one hand I would make on the other; and the great advantage it would be to them I should think they would see at once and jump at the opportunity. You saw the paper I had from them when here. It is openly acknowledged by all the heirs, & is better than a deed for the purpose.

I could send you a copy of it if you wish, & can put the original on record any time it is necessary. My word to you as to the price is good until further notice. You better be ready for this in case the whole falls through, or if you prefer my proposition, withdraw the other, as I think it doubtful if they do anything in time. This is confidential.

Yours,

(S'n'd) D. V. B. HENARIE.

120 OFFICE OF FERRY & WHITE,
PORTLAND, *Dec. 8th*, 1882.

D. V. B. Henarie.

DEAR SIR: I have written a lengthy letter to Beach, stating my proposition, so he can explain it to Mrs. Martin.

Those warrants do not amount to anything, as they are and will cut no figure in the sale of the land to any other party in future.

I can hypothecate 2,000 acres of them here for enough to pay me expenses, and I am confident that I can drive the trade to a head, as I can answer a thousand questions that Leigh cannot, and I will follow the thing up night and day. Besides, I can make a sale of your entire interest, as you wished me to, I think, beyond doubt. But should I not succeed, the difference in those warrants among all of you would amount to nothing, and if Mrs. Martin wants to try the New York parties let them have a whack at it, and the one that makes the first payment the sale, but don't bond it to them. If they make the sale, give them the commission and give me all the warrants or a portion of the commission to make me even on what I have spent. Hoping to hear from you as soon as you hear from Leigh,

Yours truly,

(S'g'd) J. H. FISK.

Exhibit "P."

121 NEW YORK CITY, *Feb. 7th*, 1881.

D. V. B. Henarie.

DEAR SIR: I was speaking with Fowler the other day in Boston about your land. He told me that he was in San Francisco last

summer, and that Mr. Martin's partner, a Mr. Lillian (I think was the name), told him that the land could be bought for much less than $1.00 per acre, which I was advocating. So you see, to do anything in Boston I have got to take him in with me, but I am not trying to do anything more than to get matters in shape so I can make you a binding offer when I return to San Francisco next month, which I expect to do.

Respectfully yours,

(S'n'd) J. H. FISK.

Exhibit "Q."

122 [Endorsed:] 4916. Circuit court, State of Oregon, for Multnomah county. J. H. Fisk *vs.* D. V. B. Henarie *et al.* Bill of exceptions. Filed May 12th, 1885. I. N. Sanders, cl'k, by Milton Weidler, deputy.

123 [Endorsed:] No. 10946. In the circuit court, Multnomah county, State of Oregon. January term, 1885. Judgment rendered April 17, 1885. Docketed. J. H. Fisk *vs.* D. V. B. Henarie. Judgment. Costs and disbursements against plaintiff. Filed April 30th, 1885. I. N. Sanders, clerk, by Milton Weidler, deputy.

124 Be it remembered that at a regular term of the circuit court of the State of Oregon for the county of Multnomah, begun and held at the county court-house, in the city of Portland, in said county and State, on Monday, the 18th day of January, A. D. 1886, the same being the 3rd Monday in said month and the time fixed by law for holding a regular term of said court—Hon. Royal B. Stearns, judge, presiding in department No. —; —whereupon, on this Thursday, the 18th day of March, A. D. 1886, the same being the 51st judicial day of said term of said court holden, among other proceedings the following was had, to wit:

JAMES H. FISK, Plaintiff,
vs.
D. V. B. HENARIE, PETER DONAHUE, ELEANOR MARTIN, Thomas S. Martin, Edward Martin, and John D. Wilcox, Defendants. } 4916.

Now, at this time, comes the plaintiff, by his attorneys, and moves the court to enter upon the journal the mandate of the supreme court, herein duly authenticated and in the following words, to wit:

Mandate Supreme Court.

125 Be it remembered that at a regular term of the supreme court of the State of Oregon, begun and held at the court-room, in the city of Salem, on the first Monday, the 5th day, of October, 1886—present, Hon. J. B. Waldo, chief justice; Hon. W. P. Lord, associate justice; Hon. W. W. Thayer, associate justice, and J. A. Stratton, clerk—the following proceedings were had on Tuesday, the 22nd day of December, 1885, the same being the 45th judicial day of said term:

JAMES H. FISK, Appellant,
vs.
D. V. B. HENARIE, PETER DONAHUE, ELEANOR Martin, Thomas S. S. Martin, Edward Martin, and J. D. Wilcox, Respondents. } Appeal from Multnomah County.

Now, at this day, this cause came on regularly to be heard upon all the questions presented by the transcript on appeal. Whereupon came Mr. George H. Williams and Mr. Wallace Mount, attorn*ies* for said appellant, and Mr. James K. Kelly and Mr. Arthur L. Frazier, attorn*ies* for said respondents; and after hearing the arguments of the attorn*ies* for the respective parties, the court being in doubt what judgment ought to be rendered, this question is reserved for further consideration.

And afterwards, to wit, on Monday, the 11th day of January, 1886, the same being the fifty-first judicial day of said term, when *was* present the same justices and other officers as on the first day, the following proceedings were had:

126 JAMES H. FISK, Appellant,
vs.
D. V. B. HENARIE, PETER DONAHUE, ELEANOR Martin, Thomas S. S. Martin, Edward Martin, and John D. Wilcox, Respondents. } Appeal from Multnomah County.

This cause having heretofore, to wit, on Tuesday, the 22nd day of December, 1885, been duly argued by the attorn*ies* for the respective parties above named, and having been then by this court reserved for further consideration, now, at this time, this court, having duly considered all the questions presented by the transcript in said cause and the arguments of the respective attorn*ies* thereon, and being now fully advised in the premises, finds that there is error, as alleged. It is therefore considered by the court that the judgment in this cause in the court below rendered be in all things reversed, and that said appellant have and recover of and from said respondents his costs of this appeal, allowed and taxed at $131.00, and that this cause be remanded to the court below and that a new trial be there had.

127 STATE OF OREGON, } *ss*:
County of Marion, }

I, J. A. Stratton, clerk of the supreme court of the State of Oregon, do hereby certify that the foregoing transcript has been by me compared with the original, and that it is a correct transcript therefrom and of the whole of such original as the same appears of record and in my office and custody.

In testimony whereof I have hereunto set my hand and [SEAL.] affixed the seal of said court, at Salem, Oregon, this 21st day of January, 1886.

J. A. STRATTON, *Clerk.*

In the Circuit Court of the State of Oregon for the County of Multnomah.

You are hereby commanded that of the above judgment order of our supreme court you cause proper entry to be made upon the records of your court as of a judgment therein, and proceed to final determination and execution thereof as to the said order of our supreme court and to law and justice shall appertain.

In witness whereof I have hereunto set my hand and [SEAL.] affixed the seal of the supreme court of the State of Oregon, at Salem, this 21st day of January, 1886.

J. A. STRATTON,
Clerk of the said Supreme Court.

128 [Endorsed:] No. 4916. In the supreme court of the State of Oregon, October term, 1886. James H. Fisk, appellant, *vs.* D. V. B. Henarie *et al.*, respondents. Mandate. Filed March 18, 1886. I. N. Sanders, clerk, by Milton Weidler, deputy.

129 In the Circuit Court of the State of Oregon for Multnomah County.

J. H. FISK
vs.
D. V. B. HENARIE *et al.* } Affidavit of Stenographer.

STATE OF OREGON,
County of Multnomah, } *ss:*

I, H. H. Parker, being first duly sworn, say that I will well and truly report in short-hand the testimony of the witnesses in the above-entitled action, together with the objections of counsel thereto, the rulings of the court therein, and the exceptions of counsel, to the best of my ability, so help me God.

H. H. PARKER.

Subscribed and sworn to before me this 18th day of May, A. D. 1886.

I. N. SANDERS, *Clerk,*
By MILTON WEIDLER, *Deputy.*

130 [Endorsed:] No. 4916. Circuit court, Multnomah Co., Oregon. J. H. Fisk *vs.* D. V. B. Henarie *et al.* Oath of stenographer. Filed May 18th, 1886. I. N. Sanders, clerk, by Milton Weidler, dept.

131 Be it remembered that at a regular term of the circuit court of the State of Oregon for the county of Multnomah, begun and held at the county court-house, in the city of Portland, in said county and State, on Monday, the 3rd day of May, A. D. 1886, the same being the 1st Monday in said month and the time fixed by law for holding a regular term of said court—Hon. Seneca Smith, judge, presiding in department No. —; —whereupon a term

of said court is begun and holden on Tuesday, the 18th day of May, A. D. 1886, the same being the 14th judicial day of said term of said court, and among other proceedings the following was had, to wit:

Order.

J. H. FISK, Plaintiff,
vs.
D. V. B. HENARIE *et al.*, Defendants. } 4916.

At this time this cause comes on for trial, the parties appearing, the plaintiff by Messrs. Williams and Thompson, of counsel, and the defendants appearing by Messrs. Kelly and Gearin and Gilbert, of counsel. At this time, by consent of the parties, Mr. H. H. Parker is, by the court, appointed short-hand reporter, and duly files his affidavits as such short-hand reporter; and now come a jury as follows:

W. H. Warren, J. C. Norris, W. Whetmore, J. M. Scott, C. K. Stevens, M. Ginty, Enos Swan, M. P. Charles, J. H. Baker, G. J. Ross, J. A. Carnahen, and Richard M. Field, good and lawful men, duly summoned, impaneled, and sworn. After hearing the allegations of the parties and testimony on behalf of plaintiff, the court, after admonishing the jury not to converse among themselves nor to allow any other person or persons to converse with them or either of them concerning this case, orders that the jury be kept together in custody of a sworn officer, and the further hearing of this case is continued until to-morrow morning at 9 o'clock.

(Signed) SENECA SMITH, *Judge.*

132 Be it remembered that at a regular term of the circuit court of the State of Oregon for the county of Multnomah, begun and held at the county court-house, in the city of Portland, in said county and State, on Monday, the 3rd day of May, A. D. 1886, the same being the 1st Monday in said month and the time fixed by law for holding a regular term of said court—Hon. Seneca Smith, judge, presiding in department No. —; —whereupon, on this Wednesday, the 19th day of May, A. D. 1886, the same being the 15th judicial day of said term of said court holden, among other proceedings the following was had, to wit:

Order.

J. H. FISK, Plaintiff,
vs.
D. V. B. HENARIE *et al.*, Defendants. } 4916.

Now come the parties hereto and the jury as on yesterday. After hearing the remainder of the testimony the jury, with the usual admonition of the court, are placed in charge of a sworn officer, and the further hearing of the case continued until to-morrow morning at 9 o'clock.

(Signed) SENECA SMITH, *Judge.*

133 Be it remembered that at a regular term of the circuit court of the State of Oregon for the county of Multnomah, begun and held at the county court-house, in the city of Portland, in said county and State, on Monday, the 3rd day of May, A. D. 1886, the same being the 1st Monday in said month and the time fixed by law for holding a regular term of said court—Hon. Seneca Smith, judge, presiding in department No. —; —whereupon, on this Thursday, the 20th day of May, A. D. 1886, the same being the 16th judicial day of said term of said court holden, among other proceedings the following was had, to wit:

Order.

J. H. FISK, Plaintiff,
vs.
D. V. B. HENARIE *et al.*, Defendants. } 4916.

Now comes the parties hereto and the jury as on yesterday. After hearing the arguments of counsel the jury, with the usual admonition of the court, are placed in charge of a sworn officer, and the further hearing of this case continued until to-morrow morning at 9 o'clock.

(Signed) SENECA SMITH, *Judge.*

134 In the Circuit Court of the State of Oregon for the County of Multnomah.

J. H. FISK, Plaintiff,
vs.
DANIEL V. B. HENARIE, PETER DONAHUE, ELEANOR MARTIN, Thomas S. Martin, Edward Martin, and John D. Wilcox, Defendants.

We, the jury in the above-antitled case, find a verdict for the plaintiff and against the following-named defendants: Daniel V. B. Henarie, Peter Donahue, Eleanor Martin, Thomas S. Martin, Edward Martin, and John D. Wilcox, and assess the plaintiff's damages at sixty thousand dollars.

M. P. CHARLES, *Foreman.*

135 [Endorsed:] Fisk *vs.* Henarie *et al.* Verdict. Filed May 21st, 1886. I. N. Sanders, clerk, by Milton Weidler, deputy.

136 Be it remembered that at a regular term of the circuit court of the State of Oregon for the county of Multnomah, begun and held at the county court-house, in the city of Portland, in said county and State, on Monday, the 3rd day of May, A. D. 1886, the same being the 1st Monday in said month and the time fixed by law for holding a regular term of said court—Hon. Seneca Smith, judge, presiding in department No. —; —whereupon, on this Friday, the 21st day of May, A. D. 1886, the same being the 17th judicial day of said term of said court holden, among other proceedings the following was had, to wit:

J. H. FISK, Plaintiff,
vs.
D. V. B. HENARIE, Defendant. } 4916.

Now come the parties hereto and the jury as upon yesterday. After hearing the instructions of the court the jury retire in charge of a sworn officer to deliberate on their verdict. After being out for a time they return into court and present their verdict in writing; which verdict reads as follows:

We, the jury in the above-entitled case, find a verdict for the plaintiff and against the following-named defendants, Daniel V. B. Henarie, Peter Donahue, Eleanor Martin, Thomas S. Martin, Edward Martin, and John D. Wilcox, and assess the plaintiff's damages at sixty thousand dollars.

(Signed) M. P. CHARLES, *Foreman.*

Whereupon the jury are discharged from further consideration of the case.

(Signed) SENECA SMITH, *Judge.*

137 In the Circuit Court of the State of Oregon for Multnomah County.

JAMES H. FISK, Plaintiff,
vs.
D. V. B. HENARIE, PETER DONAHUE, ELEANOR MARTIN, & Others, Defendants.

It is admitted by the parties, plaintiff and defendants, that since the trial of the above-entitled cause in this court, on the — day of ——, 1885, Peter Donahue, one of said defendants, died, leaving as the executors of his last will and testament the following persons: James M. Donahue, Annie Donahue, and Mary Ellen Van Schroder, all residing in the State of California.

It is therefore stipulated and agreed that the said executors shall be substituted as defendants in place of the said Peter Donahue, dec'd.

H. Y. THOMPSON,
Of Attorneys for Pl'ff.
JAMES K. KELLY &
GEARIN & GILBERT,
Attorneys for Def'ts.

May 18, 1886.

138 [Endorsed:] 4916. James H. Fisk *vs.* D. V. B. Henarie, Peter Donahue, & others. Substitution of executors of Peter Donahue. Filed May 18th, 1886. I. N. Sanders, clerk, by Milton Weidler, deputy.

139 In the Circuit Court of the State of Oregon for the County of Multnomah.

Action at law.

JAMES H. FISK, Plaintiff,
vs.
D. V. B. HENARIE, PETER DONAHUE, ELEANOR MARTIN, THOMAS S. MARTIN, EDWARD MARTIN, JOHN D. WILCOX, Defendants.

Now come the defendants in the above-entitled action and move the court to set aside the verdict in this court and grant a new trial for the following causes:

First. Insufficiency of the evidence to justify the verdict, and that the same is against law.

Second. Insufficiency of evidence to justify the verdict against the defendants Peter Donohue, Eleanor Martin, Thomas S. Martin, Edward Martin, and J. D. Wilcox.

140 Third. Error in law occur-ing at the trial and excepted to by the defendants, as follows:

1st. The court erred in excluding from the jury the exhibit attached to the first deposition of J. Studdy Leigh, being a copy of the agreement between Oviat and Fisk.

2nd. The court erred in excluding from the jury the articles of copartnership of Leigh, Payne & Co., attached to the second deposition of J. Studdy Leigh.

3rd. The court erred in charging the jury that the contract between the defendants and Leigh, Payne & Co., dated Oct. 4, 1881, and the modified contract of Sept. 19, 1882, were binding and obligatory on said Leigh, Payne & Co.

4th. The court erred in refusing to charge the jury as requested by the defendants in the 1st and 2nd instructions asked.

5th. The court erred in charging the jury that the plaintiff was entitled to recover if the failure of Leigh, Payne & Co. to pay the purchase-money was owing to the fault of the de-

141 fendants or their neglect, although the contract was that plaintiff should recover ten per cent. of the money actually paid by Leigh, Payne & Co.

6th. The court erred in refusing to instruct the jury, as requested by defendants' attorneys, that the Exhibit No. 3 offered in evidence by defendants, to wit, a letter of Fisk to Henarie, dated August 13, 1881, was a part of the written contract on which their action is based, and it shows that the plaintiff was entitled to recover his commissions only from money actually received from the purchasers of said lands.

7th. The court erred in refusing to allow the defendants to read in evidence to the jury the exhibit attached to Belknap's deposition because it contained the admis-ions of plaintiff as to when his commission was to be paid and how it was to be paid.

JAMES K. KELLY,
GEARIN & GILBERT,
Attorneys for Def'ts.

142 STATE OF OREGON, } ss:
County of Multnomah, }

Due service of the within motion is hereby accepted, at Portland, Oregon, this 22nd day of May, 1886, by receiving a copy thereof, duly certified to as such by James K. Kelly, counsel for defendants.

GEO. H. WILLIAMS,
Att'y for Pl'ff.

143 [Endorsed:] No. 4916. In the circuit court of the State of Oregon for the county of Multnomah, department No. 1. James H. Fisk *vs.* D. V. B. Henarie and others. Motion for a new trial. Filed May 22nd, 1886. I. N. Sanders, clerk, by Milton Weidler, deputy. James K. Kelly & Gearin & Gilbert, defendants' attorneys.

144 In the Circuit Court of the State of Oregon for the County of Multnomah.

Action at law.

JAMES H. FISK, Plaintiff,
vs.
D. V. B. HENARIE, PETER DONAHUE, ELEANOR MARTIN, THOMAS S. MARTIN, EDWARD MARTIN, & JOHN D. WILCOX, Defendants.

Now comes the defendants and move the court to enter a judgment for the defendants notwithstanding the verdict of the jury, because the facts stated in the complaint do not constitute a cause of action against the defendants.

2nd. Because the facts stated in the complaint do not constitute a cause of action against the defendant Peter Donahue.

JAMES K. KELLY &
GEARIN & GILBERT,
Attorneys for Defendants.

145 STATE OF OREGON, } ss:
County of Multnomah, }

Due service of the within motion is hereby accepted, at Portland, Oregon, this 22nd day of May, 1886, by receiving a copy thereof, duly certified to as such by James K. Kelly, counsel for defendants.

GEO. H. WILLIAMS,
Attorney for Pl'ff.

146 [Endorsed:] No. 4916. James H. Fisk *vs.* D. V. B. Henarie and others. Motion for judgment for def'ts notwithstanding the verdict. Filed May 22nd, 1886. I. N. Sanders, clerk, by Milton Weidler, deputy. James K. Kelly & Gearin & Gilbert, attorneys for defendants.

147 Be it remembered that at a regular term of the circuit court of the State of Oregon for the county of Multnomah, begun and held at the county court-house, in the city of Portland, in said county and State, on Monday, the 3rd day of May, A. D.

1886, the same being the 1st Monday in said month and the time fixed by law for holding a regular term of said court—Hon. Seneca Smith, judge, presiding in department No.—; —whereupon, on this Wednesday, the 26th day of May, A. D. 1886, the same being the 21st judicial day of said term of said court holden, among other proceedings the following was had, to wit:

J. H. FISK, Plaintiff,
vs.
D. V. B. HENARIE *et al.*, Defendants. } 4916.

Upon the agreement of counsel for the plaintiff and defendants, respectively, made in open court, it is ordered that the motions for new trial and for judgment of the defendants and motion for judgment by plaintiff be, and they are hereby, set for hearigg on Tuesday, the 1st day of June, 1886, at 9 o'clock a. m., and if the court shall not then be in session the said motion shall be heard on Wednesday, the 2nd day of June, 1886, at 9 o'clock of said day.

(Signed) SENECA SMITH, *Judge.*

148 In the Circuit Court of the State of Oregon for the County of Multnomah.

J. H. FISK, Plaintiff,
vs.
D. V. B. HENARIE, PETER DONAHUE, ELEANOR MARTIN, THOS. S. MARTIN, EDWARD MARTIN, JOHN D. WILCOX.

Now comes the plaintiff and moves the court for a judgment upon the verdict heretofore rendered in the above-entitled action in favor of the plaintiff and against the defendants, D. V. B. Henarie, Eleanor Martin, Thos. S. Martin, Edward Martin, and John D. Wilcox.

GEO. H. WILLIAMS,
H. Y. THOMPSON,
Attorneys for Plaintiff.

149 STATE OF OREGON, } *ss:*
County of Multnomah, }

Due service of the within motion is hereby accepted, at Portland, Oregon, this 29th day of May, 1866, by receiving a copy thereof, duly certified to as such by H. Y. Thompson, counsel for plaintiff.

JAMES K. KELLY,
Attorney for Defendants.

150 [Endorsed:] 4916. Circuit court, State of Oregon, for Multnomah county. J. H. Fisk *vs.* D. V. B. Henarie *et al.* Motion for judgment on the verdict. Filed June 1st, 1886. I. N. Sanders, clerk, by Milton Weidler, deputy. Geo. H. Williams, H. Y. Thompson, attorneys for plaintiff.

151 Be it remembered that at a regular term of the circuit court of the State of Oregon for the county of Multnomah,

begun and held at the county court-house, in the city of Portland, in said county and State, on Monday, the 3rd day of May, A. D. 1886, the same being the 1st Monday in said month and the time fixed by law for holding a regular term of said court—Hon. Seneca Smith, judge, presiding in department No. —; —whereupon, on this Wednesday, the 2nd day of June, A. D. 1886, the same being the 26th judicial day of said term of said court holden, among other proceedings the following was had, to wit:

Order.

J. H. FISK, Plaintiff,
vs.
D. V. B. HENARIE *et al.*, Defendants.

At this time this cause comes on for hearing upon motion for new trial, motion for judgment on the verdict, and motion for judgment notwithstanding the verdict, plaintiff appearing by Messrs. Williams & Thompson, and defendants appearing by Messrs. Kelly and Gilbert.

After hearing said motions and the arguments of counsel the court, not being fully advised in the premises, takes the same under advisement.

(Signed) SENECA SMITH, *Judge.*

152 Be it remembered that at a regular term of the circuit court of the State of Oregon for the county of Multnomah, begun and held at the county court-house, in the city of Portland, in said county and State, on Monday, the 3rd day of May, A. D. 1886, the same being the 1st Monday in said month and the time fixed by law for holding a regular term of said court—Hon. Seneca Smith, judge, presiding in department No. —; —whereupon, on this Wednesday, the 30th day of June, A. D. 1886, the same being the 48th judicial day of said term of said court holden, among other proceedings the following was had, to wit:

J. H. FISK, Plaintiff,
vs.
D. V. B. HENARIE, PETER DONAHUE, ELEANOR MARTIN, THOS. S. MARTIN, EDWARD MARTIN, & JOHN D. WILCOX, Defendants.

This cause having been heretofore argued by counsel for the respective parties herein upon motion for judgment notwithstanding the verdict and submitted to the court for its decision, and the court being at this time fully advised in the premises, it is ordered that said motion be, and the same is hereby, allowed; and now, on motion of counsel for the defendants, it is ordered and adjudged that defendants do have and recover of and from plaintiff J. H. Fisk their costs and disbursements herein, taxed at $292.98, and that execution issue therefor; and it is further ordered that plaintiff be allowed until the first day of the next regular term of this court in which to prepare and file a bill of exceptions herein.

(Signed) SENECA SMITH, *Judge.*

153 *Cost Bill.*

In the Circuit Court for the County of Multnomah, State of Oregon.

JAMES H. FISK, Plaintiff,
vs.
D. V. B. HENARIE & Others, Defendants.

Statement of disbursements claimed in the above-entitled cause, viz:

Clerk's fees	$28 13
Sheriff's fees	
Trial fees	
Costs in lower court	
Advertising	
Dispositions—last deposition of J. Studdy Leigh	25 00
Attorney's fee	10 00
Witnesses' fee (see over on back of this bill)	60 40
Referee's fees	
Disbursements and costs on former trial (see)	
Cost bill filed April 15th, 1885	140 45
H. H. Parker, stenographer, ½ bill	29 00
Total	$292 98

STATE OF OREGON,
County of Multnomah, } *ss:*

I, James K. Kelly, being duly sworn, say I am the attorney for the defendants in the above-entitled cause; that the disbursements set forth above have been necessarily incurred in the prosecution of this suit, and that they are entitled to recover the same from the plaintiff.

JAMES K. KELLY.

Subscribed and sworn to before me this 1st day of July, A. D. 1886.

I. N. SANDERS, *Clerk,*
By MILTON WEIDLER, *Deputy.*

154 Witness fees:

T. B. Beach, witness, 2 days	$4 00
Mil-age 220, miles circular in Oregon	22 00
P. J. Martin, witness, 2 days	4 00
Mil-age in Oregon, 220 miles circular	22 00
Edward Martin, Jr., 2 days witness and mileage	4 20
Thomas S. Martin, 2 days	4 20
	$60 40

155 [Endorsed:] No. 4916. Circuit court for Multnomah county, State of Oregon. J. H. Fisk, plaintiff, *vs.* D. V. B. Henarie and others. Bill of disbursements. Filed July 1, 1886. I. N. Sanders, clerk.

156 In the Circuit Court of the State of Oregon for Multnomah County.

J. H. FISK, Plaintiff,
vs.
D. V. B. HENARIE, PETER DONAHUE, ELEANOR MARTIN, THOS. S. MARTIN, EDWARD MARTIN and JOHN D. WILCOX, Defendants.

The above-entitled action came on for trial upon the merits in the above-entitled court on the 18th day of May, 1886, the plaintiff appearing by Geo. H. Williams, Geo. H. Durham, and H. Y. Thompson, his attorneys, and the def'ts appearing by James K. Kelly and Gearin and Gilbert, their attorneys; and it appearing that Peter Donahue, one of the defendants, had died since said action was commenced, on motion, the executors of said Donahue were substituted in his stead.

Thereupon a jury was duly empanelled and sworn and the said trial proceeded from day to day until the conclusion thereof. The said jury, after having heard the evidence and the arguments of counsel and the instructions of the court, retired for deliberation and returned to the court the following verdict, to wit:

In the Circuit Court of the State of Oregon for the County of Multnomah.

J. H. FISK, Plaintiff,
vs.
DANIEL V. B. HENARIE, PETER DONAHUE, ELEANOR MARTIN, THOS. S. MARTIN, EDWARD MARTIN, and JOHN D. WILCOX.

157 "We, the jury in the above-entitled cause, find a verdict for plaintiff and against the following-named defendants: Daniel V. B. Henarie, Peter Donahue, Eleanor Martin, Thomas S. Martin, Edward Martin, and John D. Wilcox, and assess the plaintiff's damages at sixty thousand dollars.

"M. P. CHARLES, *Foreman.*"

Which said verdict was thereupon, to wit, on the 21st day of May, 1886, duly received, filed, and recorded as the verdict of the jury in said action.

Thereafter, to wit, on the 22nd day of May, 1886, the defendants duly filed the following motions, to wit (after the title of the action): "Now come the defendants and move the court to enter a judgment notwithstanding the verdict of the jury, because the facts stated in the complaint do not constitute a cause of action against the defendants; 2nd, because the facts stated in the complaint do not constitute a cause of action against the defendant Peter Donahue."

Upon the same day the defendants filed a motion for a new trial upon the grounds stated in the said motion.

On the 1st day of June, 1886, the plaintiff duly filed his motion for judgment upon the verdict in favor of the plaintiff and against all of the defendants, excepting Peter Donohue. Thereafter the said three motions, to wit, the motion for judgment notwithstanding the verdict, the motion for a new trial, and the motion for judgment upon the verdict, were by consent of the parties heard, argued, and submitted to the court at the same time, and by the court taken under advisement. Thereafter, to wit, on the 30 day of June, 1886, the court, having duly considered the matter, granted, sustained, and allowed the said motion of the defendants for a judgment notwitstanding the verdict, upon each and both of the grounds therein stated, holding and ruling, 1st, that the complaint does not
158 state facts sufficient to constitute a cause of action against the defendants, to which said ruling of the court the plaintiff then and there duly excepted; and, 2d, holding and ruling that the complaint does not state facts sufficient to constitute a cause of action against the defendant Peter Donahue, to which holding and ruling of the court the plaintiff then and there duly excepted. Thereupon the court disallowed and denied the said motion of the plaintiff for a judgment upon the verdict, to which ruling of the court the plaintiff then and there duly excepted; and thereupon the court rendered a judgment notwithstanding the verdict in favor of the defendants and against the plaintiff for the costs of said action, to which ruling of the court the plaintiff then and there duly excepted. Upon the said motion for a new trial the court made no order respecting the same and expressed no opinion thereon.

The foregoing bill of exceptions was presented to and allowed by the court this 15th day of July, 1886.

SENECA SMITH,
Judge of said Court Sitting at the Time of said Trial.
E. D. SHATTUCK, *Judge.*

We agree that the foregoing bill of exceptions is correct.

JAMES K. KELLY,
One of Def'ts' Att'ys.

159 [Endorsed:] 4916. Circuit court of the State of Oregon for the county of Multnomah. J. H. Fisk, plaintiff, *vs.* D. V. B. Henarie *et al.*, defendants. Bill of exceptions. Filed July 15th, 1885. Wm. Church, Jr., clerk, by Milton Weidler, deputy.

160 Be it remembered that at a regular term of the circuit court of the State of Oregon for the county of Multnomah begun and held at the county court-house, in the city of Portland, in said county and State, on Monday, the 6th day of September, A. D. 1886, the same being the first Monday in said month and the time fixed by law for holding a regular term of said court—Hon. E. D. Shattuck, judge presiding in department No. 1—whereupon, on this, Friday, the 12th day of November, A. D. 1886, the same

being the 58th judicial day of said term of said court holding, among other proceedings the following was had, to wit:

J. H. FISK, Plaintiff,
vs.
D. V. B. HENARIE, PETER DONAHUE, ELEANOR MARTIN, Thomas S. Martin, Edward Martin, and John D. Wilcox, Defendants. } 4916.

An appeal in this case having been heretofore taken to the supreme court of the State of Oregon by the above-named plaintiff from the judgment of this court herein heretofore rendered in favor of the defendants and against the plaintiff, and said appeal having been by said supreme court duly heard and determined and decision duly entered in its journal and the cause remitted by mandate to this court, *and* now, on presentation of said mandate and upon the plaintiff's motion, it is ordered that said mandate be duly entered of record in the journals of this court, and the clerk of this court having duly received said mandate, which, with said decision of said supreme court, is as follows, to wit:

161 Be it remembered that at a regular term of the supreme court of the State of Oregon begun and held at the court room, in the city of Salem, on the first Monday, the fourth day of October, 1886—present, Hon. William P. Lord, chief justice; Hon. W. W. Thayer, associate justice; Hon. Reuben S. Strahan, associate justice, and J. A. Stratton, clerk—the following proceedings were had on Monday, the 18th day of October, 1886, the same being the eighth judicial day of said term:

J. H. FISK, Appellant,
vs.
D. V. B. HENARIE, PETER DONAHUE, ELEANOR Martin, Thomas Martin, Edward Martin, and John D. Wilcox, Respondents. } Appeal from Multnomah County.

Now, at this day, this cause come on regularly to be heard upon all the questions presented by the transcript on appeal, whereupon came Mr. H. Y. Thompson, Mr. Geo. H. Durham, and Mr. George H. Williams, attorneys for said appellant, and Mr. James K. Kelly and Mr. W. B. Gilbert, attorneys for said respondents, and, after hearing the arguments of the attorneys for the respective parties, the court being in doubt what judgment ought to be rendered, this question is reserved for further consideration.

And afterwards, to wit, on Wednesday, the 20th day of October, 1886, the same being the 10th judicial day of said term, when were present the same justices and other officers as on the first day, the following proceedings were had:

J. H. FISK, Appellant,
vs.
D. V. B. HENARIE, PETER DONAHUE, ELEANOR Martin, Thomas S. Martin, Edward Martin, John D. Wilcox, Respondents.
} Appeal from Multnomah County.

162 This cause having heretofore, to wit, on Monday, the 18th day of October, 1886, been duly argued by the attorneys for the respective parties above named, and having been then by this court reserved for further consideration, now, at this time, the court, having duly considered all questions presented by the transcript in said cause and the arguments of the respective attorneys thereon and being now fully advised in the premises, finds that there is error as alleged, as well in rendering judgment appealed from as in making the order denying the said appellant's motion for judgment upon the verdict herein.

It is therefore considered by the court that the judgment in this cause in the court below rendered and also the said order denying the plaintiff's said motion for judgment upon the verdict herein be in all things reversed and set aside; that the said appellant have his costs and disbursements of this appeal allowed and taxed at $78.75; that this cause be remanded to the court below, and that such further proceedings be there had as may by law be required.

STATE OF OREGON, *County of Marion,* } *ss:*

I, J. A. Stratton, clerk of the supreme court of the State of Oregon, do hereby certify that the foregoing transcript has been by me compared with the original, and that it is a correct transcript therefrom and of the whole of such original as the same appears of record and in my office and custody.

Supreme Court Seal. In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Salem, Oregon, this 1st day of November, 1886.

J. A. STRATTON, *Clerk.*

163 To the circuit court of the State of Oregon for the county of Multnomah:

You are hereby commanded that of the above judgment order of our supreme court, you cause proper entry to be made upon the records of your court as of a judgment therein and proceed to final determination and execution thereof as to the said order of our supreme court and to law and justice shall appertain.

In witness whereof I have hereunto set my hand and affixed the seal of the supreme court of the State of Oregon, at Salem, this first day of November, 1886.

[SUPREME COURT SEAL.] J. A. STRATTON, *Clerk of the said Supreme Court.*

(Signed) E. D. SHATTUCK, *Judge.*

164 [Endorsed:] In the supreme court for the State of Oregon. J. H. Fisk, appellant, *vs.* D. V. B. Henarie *et al.*, respondents. Mandate. Filed November 13th, 1886. Wm. Church, Jr., clerk, by J. D. Coleman, deputy.

165 Be it remembered that at a regular term of the circuit court of the State of Oregon for the county of Multnomah, begun and held at the county court-house, in the city of Portland, in said county and State, on Monday, the 6th day of September, A. D. 1886, the same being the first Monday in said month and the time fixed by law for holding a regular term of said court—Hon. E. D. Shattuck, judge, presiding in department No. 1—whereupon, on this Saturday, the 18th day of December, A. D. 1886, the same being the 87th judicial day of said term of said court holden, among other proceedings the following was had, to wit:

Order.

J. H. Fisk, Plaintiff,
vs.
D. V. B. Henarie *et al.*, Defendants. } 4916.

This cause having been heretofore argued and submitted upon "defendants' motion for new trial:" Now, at this time, the court being fully advised in the premises, it is ordered that said motion be, and the same is hereby, allowed. Ten days are granted in which to settle bill of exceptions.

(Signed) E. D. SHATTUCK, *Judge.*

166 In the Circuit Court of the State of Oregon for the County of Multnomah.

James H. Fisk, Plaintiff,
vs.
D. V. B. Henarie *et al.*, Defendants.

The above-entitled cause comes on for trial on the 18th day of May, 1886, upon the minutes, the plaintiff appearing by Geo. H. Williams and H. Y. Thompson, his attorneys, and the defendants appearing by Jas. K. Kelly and Gearin & Gilbert, their attorneys, and, a jury having been duly empanelled and sworn, the trial of said cause proceeded from day to day until the 21st day of May, 1886, upon which the said day the jury returned into said court the following verdict, to wit:

(After entitling said cause.) "We, the jury in the above-entitled cause, find a verdict for the plaintiff and against the following-named defendants, to wit: D. V. B. Henarie, Peter Donahue, Eleanor Martin, Thomas S. Martin, Edward Martin, and John D. Wilcox, and assess the plaintiff's damages at $60,000.

"M. R. CHARLES, *Foreman.*"

The foregoing verdict was filed on the 21st day of May, 1886.

On the next day (May 22nd) the defendants filed the following motion (after entitling the cause):

Bill of Exceptions.

Now come the defendants and move the court to enter a judgment, notwithstanding the verdict, because the facts stated
167 in the complaint do not constitute a cause of action against the defendants; 2nd, because the facts stated in the complaint do not constitute a cause of action against the defendant Peter Donahue.

Upon the same day the defendants filed a motion for a new trial of said action upon grounds of insufficiency of the evidence to justify the verdict and that it is against law, insufficiency of the evidence to justify the verdict against the defendants Peter Donahue, Eleanor Martin, Thomas S. Martin, Edward Martin, and John D. Wilcox, and for errors of law occur-ing at the trial and excepted to by the defendants.

Before the said motions were presented or heard the plaintiff filed a motion for judgment upon the verdict of the jury, excepting that plaintiff did not move for judgment against the defendant Peter Donahue.

All the three of these motions were on the 2nd day of June, 1886, duly argued before the said court and by it taken under advisement; and thereafter, on the 30th day of June, 1886, the said court, having considered the matter, denied the plaintiff's motion for judgment and sustained and allowed the defendants' motion for judgment, notwithstanding the verdict, and did not say anything about the said motion for a new trial, and made no order in relation thereto, and judgment was accordingly entered in favor of the defendants and against the plaintiff for their costs and disbursements of the said action.

168 Thereafter the plaintiff duly appealed from the said judgment to the supreme court of the State of Oregon, and, the said appeal having been duly heard by the said supreme court, the said judgment was in all things reversed by said court, the said supreme court holding that it was error for the said circuit court to hold that defendants were entitled to have the said motion for judgment, notwithstanding the verdict, allowed, and that it was error to refuse — allow the plaintiff's motion for judgment upon the verdict; and thereafter, to wit, on the 12th day of November, 1886, the mandate of the said supreme court was duly entered of record in the records of the said circuit court, remanding the said cause to the said circuit court for such further proceedings as may by law be there required.

On the 26th day of November, 1886, the said cause came on to be heard upon the plaintiff's said motion for a judgment upon said verdict, the plaintiff appearing by Geo. H. Williams and H. Y. Thompson, his attorneys, and the defendants appearing by Jas. K. Kelly and W. B. Gilbert, their attorneys; and the said defendants, by their said attorneys, resisted the said motion upon the grounds that the said motion for a new trial was still pending and undisposed of, and asked that the same be heard and determined. The plaintiff

objected on the ground that the said motion for a new trial had been determined by the court; 2nd, that said motion had been waived by defendants; 3d, that said motion had been with-
169 drawn within the meaning of the statute governing motions for new trials; 4th, that the time for presenting a motion for a new trial had expired; and, 5th, that the court had no power or jurisdiction to hear or determine the said motion for a new trial. Thereupon the court reserved its decision upon the said objections and heard the arguments of the respective counsel upon the said motion for judgment upon the verdict and the said motion for a new trial and the said objections of the plaintiff above set forth, and took all of said questions under advisement.

Thereafter, on the 18th day of December, 1886, the court having considered the said several motions and objections and overruled each and all of the said several objections above set forth and held, 1st, that the said motion for a new trial had not been determined by the court; to which said ruling of the court the plaintiff then and there duly excepted; 2nd, that said motion had not been waived by the defendants; to which said ruling of the court the plaintiff then and there duly excepted; 3rd, that said motion for a new trial had not been withdrawn within the meaning of the statute governing motions for a new trial; to which ruling of the court the plaintiff then and there duly excepted; 4th, that the time for presenting a motion for a new trial had not expired; to which ruling of
170 the court the plaintiff then and there duly excepted; and, 5th, that the court had power and jurisdiction to hear and determine the said motion for a new trial; to which said ruling of the court the plaintiff then and there duly excepted, and the court declined and refused to allow the plaintiff's said motion for judgment upon the verdict and overruled the same; to which said ruling and holding of the court the plaintiff then and there duly excepted; whereupon the court set aside said verdict and allowed said motion for a new trial. The defendants have never presented or had allowed any bill of exceptions in this action.

The foregoing bill of exceptions was presented to and settled and allowed by the court on the 24th day of December, 1886.

E. D. SHATTUCK, *Judge.* [SEAL.]

The counsel for defendants object to the signing and filing of this or any bill of exceptions at this state of the cause.

E. D. SHATTUCK, *Judge.*

GEO. H. WILLIAMS AND
H. Y. THOMPSON,
Attorneys for Plaintiff.

171 Presented for allowance on the 24th day of December, 1886, and time for hearing matter fixed.

STATE OF OREGON, }
County of Multnomah, } *ss:*

I, H. Y. Thompson, being duly sworn, say that I served the within

bill of exceptions on Jas. K. Kelly, in person, at his office in Portland, he being an attorney for the defendants, by delivering to him a copy thereof, certified to by myself, as provided by the rules of this court, on the 24th day of December, 1886, at 9 o'clock a. m.

H. Y. THOMPSON.

Subscribed and sworn to before me the 24th day of December, 1886.

WM. CHURCH, JR., *Clerk*,
By J. D. COLEMAN, *Deputy*.

172 [Endorsed:] Circuit court, State of Oregon, Multnomah county. James H. Fisk *vs.* D. V. B. Henarie *et al.* Plaintiff's bill of exceptions. Service accepted December 24th, 1886, but we deny the right of plaintiff to a bill of exceptions at this time. James K. Kelly, def'ts' att'y. Filed Dec. 24th, 1886. Wm. Church, Jr., clerk, by J. D. Coleman, deputy. Geo. H. Williams and H. Y. Thompson, att'ys for pl'ff.

173 Be it remembered that at a regular term of the circuit court of the State of Oregon for the county of Multnomah, begun and held at the county court-house, in the city *if* Portland, in said county and State, on Monday, the 2nd day of May, A. D. 1887, the same being the first Monday in said month and the time fixed by law for holding a regular term of said court—Hon. E. D. Shattuck, judge, presiding in department No. 1—whereupon, on this Monday, the 16th day of May, A. D. 1887, the same being the 13th judicial day of said term of said *said* court holden, among other proceedings the following was had, to wit:

J. H. FISK, Plaintiff,
vs.
D. V. B. HENARIE, PETER DONAHUE, ELEANOR MARTIN, THOS. S. MARTIN, EDWARD MARTIN, & JOHN D. WILCOX, Defendants.

Now come J. K. Kelley and presents the mandate of the supreme court of the State of Oregon in the above-entitled cause; which mandate is in words and figures as follows, to wit:

174 Be it remembered that at a regular term of the supreme court of the State of Oregon, begun and held at the court-room in the city of Salem on the first Monday, the 7th day, of March, 1887—present, Hon. William P. Lord, chief justice; Hon. W. W. Thayer, associate justice; Hon. Reuben S. Strahan, associate justice, and J. A. Stratton, clerk—the following proceedings were had on Monday, the 18 day of April, 1887, the same being the 27th judicial day of said term:

JAMES H. FISK, Appellant,
vs.
D. V. B. HENARIE, PETER DONAHUE, ELEANOR MARTIN, THOMAS S. MARTIN, EDWARD MARTIN, and JOHN D. WILCOX, Respondents.

This cause having been heretofore, to wit, on the 4th day of

April, 1887, duly argued and submitted to the court upon the merits of said cause, and also upon the motion of the respondents' counsel to dismiss the appeal herein, and now the court, being full-advised as to the law governing this cause, finds that said motion is well taken in point of law. It is therefore ordered and adjudged by the court that said motion to dismiss said appeal be allowed, and said cause is dismissed. It is further ordered that this cause be remanded to the court below, and that such further proceedings be there had as may to law and justice appertain.

It is further ordered and adjudged that the respondent have and recover *off* and from the appellant, and also James McPhelan
175 and R. H. Thompson, their sureties on appeal, their costs and disbursements herein allowed and taxed at $62.75, and that they have execution therefor.

176 STATE OF OREGON, } ss:
Marion ——, }

I, W. H. Holmes, clerk of the supreme court of the State of Oregon, do hereby certify that the foregoing transcript has been by me compared with the original, and that it is a correct transcript therefrom and of the whole of such original as the same appears of record and in my office and custody.

In testimony whereof I have hereunto set my hand and
[SEAL.] affixed the seal of said court, at Salem, Oregon, this 4th day of May, 1887.

W. H. HOLMES, *Clerk.*

To the circuit court of the State of Oregon for the county of Multnomah:

You are hereby commanded that of the above judgement order of our supreme court you cause proper entry to be made upon the records of your court as of a judgement therein and proceed to final determination and execution thereof as to the said order of our supreme court and to law and justice shall appertain.

In witness whereof I have hereunto set my hand and
[SEAL.] affixed the seal of the supreme court of the State of Oregon, at Salem, Oregon, this 4th day of May, 1887.

W. H. HOLMES,
Clerk of the said Supreme Court.

177 Received of J. H. Fisk thirty-two dollars on account of the costs of the supreme court, the balance having been paid to the clerk of the supreme court by H. Y. Thompson.
May 14th, 1887.

JAMES K. KELLY,
Attorney for Def'ts.

[Endorsed:] J. H. Fisk *vs.* D. V. B. Henarie, Peter Donahue, & others. Mandate. Filed May 14, 1887. Wm. Church, Jr., clerk, by J. D. Coleman, deputy.

178 Be it remembered that at a regular term of the circuit court of the State of Oregon for the county of Multnomah, begun and held at the county court-house, in the city of Portland, in said county and State, on Monday, the 2nd day of May, A. D. 1887, the same being the first Monday in said month and the time fixed by law for holding a regular term of said court—Hon. E. D. Shattuck, judge, presiding in department No. 1—whereupon, this Monday, the 11th day of July, A. D. 1887, the same being the 54th judicial day of said term of said court holden, among other proceedings the following was had, to wit:

Jury.

J. H. FISK, Plaintiff,
vs.
D. V. B. HENARIE *et al.*, Defendants. } 4916.

At this time this cause comes on for trial, plaintiff appearing by Messrs. H. Y. Thompson, Geo. H. Williams, and J. H. Mitchell, his attorneys, and defendants by Messrs. James K. Kelly and Gearin & Gilbert, their attorneys.

Now, on application of plaintiff, J. W. Cockran is by the court appointed and is duly sworn as short-hand reporter. Now come a jury as follows, to wit: James M. Stott, John H. Hall, Peter Shoulderman, George Tuttle, W. J. Becannon, Rob't Christian, J. P. Lawler, W. G. Cathey, W. S. Fletcher, Jeremiah Stanley, H. J. Anderson, J. M. Partbow, good and lawful men, duly summoned, impanelled, and sworn. After hearing allegations of parties, by request of the parties it is ordered that the jury be kept together under charge of an officer of this court during the recess. Whereupon the court takes a recess until to-morrow morning at 9 o'clock.

(Signed) E. D. SHATTUCK.

179 Be it remembered that at a regular term of the circuit court of the State of Oregon for the county of Multnomah, begun and held at the county court-house, in the city of Portland, in said county and State, on Monday, the 2nd day of May, A. D. 1887, the same being the first Monday in said month and the time fixed by law for holding a regular term of said court—Hon. E. D. Shattuck, judge, presiding in department No. 1—whereupon, on this Tuesday, the 12th day of July, A. D. 1887, the same being the 55th judicial day of said term of said court holden, among other proceedings the following was had, to wit:

J. H. FISK, Plaintiff,
vs.
D. V. B. HENARIE *et al.*, Defendants. } 4916.

Now come the parties hereto and the jury as upon yesterday. After hearing a portion of the proofs of the parties, whereupon it is ordered that the jury be kept together under charge of an officer during the recess of the court.

(Signed) E. D. SHATTUCK, *Judge.*

180 Be it remembered that at a regular term of the circuit court of the State of Oregon for the county of Multnomah, begun and held at the county court-house, in the city of Portland, in said county and State, on Monday, the 2nd day of May, A. D. 1887, the same being the first Monday in said month and the time fixed by law for holding a regular term of said court—Hon. E. D. Shattuck, judge, presiding in department No. 1—whereupon, on this Wednesday, the 13th day of July, A. D. 1887, the same being the 56th judicial day of said term of said court holden, among other proceedings the following was had, to wit:

J. H. FISK, Plaintiff,
vs.
D. V. B. HENARIE *et al.*, Defendants. } 4916.

Now come the parties hereto and the jury as upon yesterday. After hearing remainder — proofs of parties and a portion of the argument of counsel, whereupon the court takes a recess until to-morrow morning at nine o'clock.

(Signed) E. D. SHATTUCK.

181 Be it remembered that at a regular term of the circuit court of the State of Oregon for the county of Multnomah, begun and held at the county court-house, in the city of Portland, in said county and State, on Monday, the 2nd day of May, A. D. 1887, the same being the first Monday in said month and the time fixed by law for holding a regular term of said court—Hon. E. D. Shattuck, judge, presiding in department No. 1—whereupon, on this Thursday, the 14th day of July, A. D. 1887, the same being the 57th judicial day of said term of said court holden, among other proceedings the following was had, to wit:

J. H. FISK, Plaintiff,
vs.
D. V. B. HENARIE *et al.*, Defendants. } 4916.

Now comes the parties hereto and the jury as upon yesterday. After hearing remainder of argument of counsel and instructions of the court the jury retire in charge of a sworn officer to deliberate on their verdict.

At a late hour, the jury not having returned, the court takes a recess until to-morrow morning at 9 o'clock.

(Signed) E. D. SHATTUCK, *Judge.*

182 Be it remembered that at a regular term of the circuit court of the State of Oregon for the county of Multnomah, begun and held at the county court-house, in the city of Portland, in said county and State, on Monday, the 2nd day of May, A. D. 1887, the same being the first Monday in said month and the time fixed by law for holding a regular term of said court—Hon. E. D. Shattuck, judge, presiding in department No. 1—whereupon, on this Friday, the 15th day of July, A. D. 1887, the same being the 58th

judicial day of said term of said court holden, among other proceedings the following was had, to wit:

J. H. FISK, Plaintiff,
vs.
D. V. B. HENARIE *et al.*, Defendants. } 4916.

Now come the parties hereto and the jury as upon yesterday. Thereupon the jury make an oral statement that they are unable to agree upon a verdict.

Whereupon they are discharged from further consideration of the case.

(Signed) E. D. SHATTUCK, *Judge.*

183 In the Circuit Court of the State of Oregon for Multnomah County.

J. H. FISK, Plaintiff,
vs.
D. V. B. HENARIE, PETER DONAHUE, ELEANOR MARTIN, THOS. S. MARTIN, EDWARD MARTIN, and JOHN D. WILCOX, Defendants.

To the Hon. E. D. Shattuck, judge of the circuit court of the State of Oregon for Multnomah county:

Your petitioners, D. V. B. Henarie, Eleanor Martin, and James M. Donahue, Annie Donahue, and Mary Ellen Von Schroeder, the executors of the last will and testament of Peter Donahue, deceased, respectfully show that they are now and at, and at all times since, the commencement of the above-entitled action have been citizens and residents of the State of California, residing in San Francisco, therein, and that the plaintiff, James H. Fisk, is now and at, and at all times since, the commencement of said action has been a citizen and resident of the State of Oregon, residing in Portland, therein.

Your petitioner further shows that there is and was at the time said action was commenced a controversy therein between the plaintiff aforesaid and these petitioners as defendants.

That the amount involved in said action is sixty thousand dollars, exclusive of interest and costs.

That said action is brought to recover said sum of sixty thousand dollars from these defendants, plaintiff claiming therein that
184 *on* or about the month of December, 1880, the plaintiff and said D. V. B. Henarie and Eleanor Martin as guardian of James V. Martin, Peter D. Martin, Genevive Martin, Walter S. Martin, and Andrew D. Martin, minors, and Thomas S. Martin, Edward Martin, and John D. Wilcox, trustee, for themselves agreed that if plaintiff would procure a purchaser of 600,000 acres of land they owned in Oregon at $1.00 per acre they would pay him ten per cent. thereof as compensation, and that pursuant to said contract plaintiff procured a purchaser on October 4, 1881, who entered into a written agreement to buy the same, and that thereafter the interest in said lands belonging to said minors was sold and conveyed to the defendant Peter Donahue, the plaintiff further alleging therein that no

payment has been made him on said ten per cent. commission, and sixty thousand dollars is due and owing to him thereon; that defendants have answered denying said or any indebtedness.

And your petitioner shows that said action was commenced on Nov. 13, 1883; that said defendant, Donahue, died in 1885 in the county of San Francisco, State of California, and your petitioners, James M. Donahue, Annie Donahue, and Mary Ellen Von Schroeder, are the duly appointed and acting executors of his last will and testament, which was duly admitted to probate in said county of San Francisco, and they were, on May 16, 1886, by stipulation of the parties to said action, duly substituted as defendants therein in the place and stead of their testator.

That said action has not been tried and is now pending in the above-entitled court.

That from prejudice and local influence your petitioners
185 will not be able to obtain justice in this court or in any other State court to which the said defendants may under the laws of this State remove said cause.

That the other defendants in said action, Thos. S. Martin, Edward Martin, and John D. Wilcox, now and at all times since the commencement of said action have been citizens and residents of the State of Oregon, residing in Portland, therein; that your petitioners desire to remove said cause to the circuit court of the United States for the districts of Oregon under the provisions of the act of Congress approved March 3, 1887.

Your petitioners further say that they have filed the affidavit required by the statute in such cases, and they herewith offer their bond, with surety, in the penal sum of one thousand dollars, conditioned as by the statutes of the United States required.

Your petitioner therefore prays that said bond may be accepted and approved, and that said cause may be removed into the next circuit court of the United States for the district of Oregon, and that no further proceedings may be had therein in this court.

And your petitioners will ever pray.

JAMES K. KELLY &
GEARIN & GILBERT,
Attorneys for Petitioners.

186 STATE OF CALIFORNIA, } *ss:*
City and County of San Francisco, }

I, D. V. B. Henarie, being first duly sworn, say that I am one of the petitioners above named, and that the foregoing petition is true, as I verily believe.

D. V. B. HENARIE.

Subscribed and sworn to before me this 25th day of July, 1877.

[SEAL.] EUGENE W. LEVY,
Commissioner of Deeds for the State of Oregon in California.

187 STATE OF OREGON, } ss:
County of Multnomah, }

Due service of the within — is hereby admitted, at Portland, Oregon, in said county and State, this — day of ——, 188–, by receiving a copy thereof, duly certified to as such by —— ——, attorney for —.

—— ——,
Attorney for —.

STATE OF OREGON, } ss:
—— *County,* }

I, —— ——, one of the attorneys for —, do hereby certify that I have prepared the foregoing copy of — and have carefully compared the same with the original thereof; that it is a correct — therefrom and of the whole thereof.

Dated this — day of ——, 188–.

—— ——.

188 [Endorsed:] No. —. Department No. 1. In the circuit court of the State of Oregon for Multnomah county. J. H. Fisk, plaintiff, *vs.* D. V. B. Henarie *et al.*, defendants. Petition for removal. Filed July 30th, 1887. Wm. Church, Jr., clerk, by —— ——, deputy. J. K. Kelly, Gearin & Gilbert, attorneys for defendants.

189 In the Circuit Court of the State of Oregon for Multnomah County.

J. H. FISK, Plaintiff,
vs.
D. V. B. HENARIE, PETER DONAHUE, ELEANOR MARTIN, THOS. S. MARTIN, EDWARD MARTIN, and JOHN D. WILCOX, Defendants.

STATE OF CALIFORNIA, } ss:
City and County of San Francisco, }

I, D. V. B. Henarie, and I, Eleanor Martin, being each duly sworn, each for himself and herself, say that I am one of the defendants in the above-entitled action; that I have reason to believe and do believe and I so state that from prejudice and local influence the defendants in said cause, to wit, we, the affiants, and James M. Donahue, Annie Donahue, and Mary Ellen Von Schroeder, executors of the last will and testament of Peter Donahue, deceased, will not be able to obtain justice in said State court or in any other State court to which said defendants, under the laws of the State of Oregon, have the right to remove the same on account of such prejudice and local influence.

D. V. B. HENARIE.
ELEANOR MARTIN.

Subscribed by the said D. V. B. Henarie and Eleanor Martin and by them severally sworn to before me this 25th day of July, 1887.

[SEAL.] EUGENE W. LEVY,
Commissioner of Deeds for the State of Oregon in California.

Affidavit for Removal.

190 STATE OF OREGON, } ss:
County of Multnomah, }

Due service of the within — is hereby admitted, at Portland, Oregon, in said county and State, this — day ——, 188–, by receiving a copy thereof, duly certified to as such by —— ——, attorney for —— ——.

—— ——,
Attorney for ——.

STATE OF OREGON, } ss:
—— *County,* }

I, —— ——, one of the attorneys for —— ——, do hereby certify that I have prepared the foregoing copy of —— and have carefully compared the same with the original thereof; that it is a correct — therefrom and of the whole thereof.

Dated this — day of ——, 188–.

—— ——.

191 [Endorsed:] No. —. Department No. 1. In the circuit court of the State of Oregon for Multnomah county. J. H. Fisk, plaintiff, *vs.* D. V. B. Henarie *et al.*, defendants. Affidavit for removal. Filed July 30, 1887. Wm. Church, Jr., clerk, by —— ——, deputy. J. K. Kelly and Gearin & Gilbert, attorneys for defendants.

192 *Bond for Removal.*

In the Circuit Court of the State of Oregon for Multnomah County.

J. H. FISK, Plaintiff,
vs.
D. V. B. HENARIE, PETER DONAHUE, ELEANOR MARTIN, THOMAS S. MARTIN, EDWARD MARTIN, and JOHN D. WILCOX, Defendants.

Know all men by these presents that we, D. V. B. Henarie and Eleanor Martin and James M. Donahue, Annie Donahue, and Mary Ellen Von Schroeder, executors of the last will and testament of Peter Donahue, deceased, and John O'Connor, of Portland, Oregon, as surety, are hereby held and firmly bound unto James H. Fisk in the penal sum of one thousand dollars ($1,000), lawful money of the United States; for the payment of which, well and truly to be made, we bind ourselves, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 25th day of July, 1887.

Whereas there is now pending in the circuit court of the State of Oregon for Multnomah county a suit in which J. H. Fisk is plain-

tiff and D. V. B. Henarie, Peter Donahue, Eleanor Martin, Thos. S. Martin, Edward Martin, and John D. Wilcox are defendants;

And whereas said defendants in said suit, except said Wilcox and Thos. S. and Edward Martin, have made and filed or are about to make and file in said court a petition in said suit for the removal of said suit to the circuit court of the United States for the district of Oregon:

193 Now, therefore, the condition of this obligation is such that if said petitioners, D. V. B. Henarie, Eleanor Martin, and James M. Donahue, Annie Donahue, and Mary Ellen Von Schroeder, executors of the last will and testament of Peter Donahue, deceased, shall enter and file or cause to be entered and filed in the next circuit court of the United States in and for the district of Oregon, on the first day of its session, a copy of the record in said suit and of all depositions, testimony, and other proceedings therein, and shall well and truly pay all costs that may be awarded to said circuit court of the United States if said court shall hold that said suit was wrongfully or improperly removed thereto, and shall do such other appropriate acts as by the act of Congress in that behalf are required to be done upon the removal of such suit from said State court into the United States court, then this obligation to be void, otherwise in force.

D. V. B. HENARIE. [SEAL.]
ELEANOR MARTIN. [SEAL.]
ANNIE DONAHUE. [SEAL.]
JAMES M. DONAHUE. [SEAL.]
MARY E. VON SCHROEDER. [SEAL.]
JOHN O'CONNOR.

Witness:
F. B. BEACH.
EUGENE W. LEVY.
JOHN M. GEARIN.

194 STATE OF CALIFORNIA, } ss:
City and County of San Francisco, }

On the twenty-fifth day of July, A. D. one thousand eight hundred and eighty-seven, before me, Eugene W. Levy, a commissioner of deeds for the State of Oregon, duly appointed, commissioned, and sworn, and residing in the city and county of San Francisco, State of California, personally appeared D. V. B. Henarie and Eleanor Martin (widow), to me personally known to be the identical persons whose names are subscribed to, who are described in, and who executed the annexed and within instrument, and they severally duly acknowledged to me that they executed the same freely and voluntarily for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and [SEAL.] affixed my official seal the day and year in this certificate first above written.

EUGENE W. LEVY,
Commissioner of Deeds for the State of Oregon in the State of California.

195 STATE OF CALIFORNIA, } ss:
City and County of San Francisco, }

On the twenty-fifth day of July, A. D. one thousand eight hundred and eighty-seven, before me, Eugene W. Levy, a commissioner of deeds for the State of Oregon, duly appointed, commissioned, and sworn, and residing in the city and county of San Francisco, State of California, personally appeared James M. Donahue, Annie Donahue, and Mary Ellen Von Schroeder, executors of the last will and testament of Peter Donahue, deceased, to me personally known to be the identical persons whose names are subscribed to, who are described in, and who executed the annexed and within instrument, and they severally duly acknowledged to me that they executed the same freely and voluntarily, for the uses and purposes therein mentioned, as such executors.

In witness whereof I have hereunto set my hand and [SEAL.] affixed my official seal the day and year in this certificate first above written.

EUGENE W. LEVY,
Commissioner of Deeds for the State of Oregon in California.

196 STATE OF OREGON, } ss:
County of Multnomah, }

I, Jno. O'Connor, of said county, the surety named in the foregoing bond, being duly sworn, do depose and say that I am a resident of the State of Oregon and a property-holder and freeholder therein, and that I am worth the sum of two thousand dollars over and above all my debts and liabilities and exclusive of property by law exempt from execution; that I have property in the State of Oregon liable to execution of the value of more than two thousand dollars.

Subscribed in my presence by Jno. O'Connor and by him sworn to before me this 29th day of July, A. D. 1887.

JOHN O'CONNOR.

[SEAL.] GEO. O. BRODIE,
Notary Public for Oregon.

197 STATE OF OREGON, } ss:
County of Multnomah, }

Due service of the within —— is hereby admitted, at Portland, Oregon, in said county and State, this — day of ——, 188–, by receiving a copy thereof, duly certified to as such by —— ——, attorney for —— ——.

—— ——,
Attorney for —— ——.

STATE OF OREGON, } ss:
—— *County,* }

I, —— ——, one of the attorneys for —— ——, do hereby certify that I have prepared the foregoing copy of ——, and have carefully

compared the same with the original thereof; that it is a correct — therefrom and of the whole thereof.

Dated this — day of ——, 188–.

—— ——.

198 [Endorsed:] No. —. Department No. 1. In the circuit court of the State of Oregon for Multnomah county. J. H. Fisk, plaintiff, *vs.* D. V. B. Henarie *et al.*, defendants. Bond for removal. Approved this 1st of August, 1887. E. D. Shattuck, judge. Filed July 3rd, 1887. Wm. Church, Jr., clerk. James K. Kelly & Gearin & Gilbert, attorneys for —.

199 Be it remembered that at a regular term of the circuit court of the State of Oregon for the county of Multnomah, begun and held at the county court-house, in the city of Portland, in said county and State, on Monday, the 2nd day of May, A. D. 1887, the same being the first Monday in said month and the time fixed by law for holding a regular term of said court—Hon. E. D. Shattuck, judge, presiding in department No. 1—whereupon, on this Monday, the 1st day of August, A. D. 1887, the same being the 60th judicial day of said term of said court holden, among other proceedings the following was had, to wit:

200 JAMES H. FISK, Plaintiff,
vs.
D. V. B. HENARIE, ELEANOR MARTIN, PETER DONAHUE, Thos. S. Martin, Edward Martin, John D. Wilcox, Defendants. } 4916.

Now come the defendants D. V. B. Henarie, Eleanor Martin, and Annie Donahue, James M. Donahue, and Mary Ellen Von Schroder, executors of the last will and testament of Peter Donahue, deceased, by their attorneys, James K. Kelly and Gearin and Gilbert, and present to the court their affidavit, petition, and bond for the removal of this cause to the circuit court of the United States for the district of Oregon, under the provisions of the act of Congress approved March 3rd, 1887.

And it appearing to the court that said affidavit, petition, and bond are made and executed in our form of law according to the provisions of said act of Congress;*

And it further appearing that the surety in the said bond is good and sufficient and the same is hereby approved by the court—

It is therefor ordered that the State court proceed no further in this cause, and that this action be removed into the circuit court of the United States for the district of Oregon.

(Signed) E. D. SHATTUCK, *Judge.*

* In relation to the removal of cause from State court to the court of the United States.

201 [Endorsed:] J. H. Fisk *vs.* D. V. B. Henarie and others. Form of journal entry. 401,189. Monday, Aug. 1st, 1887. 60 days.

202 STATE OF OREGON, } ss:
County of Multnomah, }

I, Wm. Church, Jr., county clerk and clerk of the circuit court of the State of Oregon for the county of Multnomah, do hereby certify that the foregoing copies of pleadings, papers, orders, and journal entries, to wit, complaint, summons, answers, affidavits, replies, orders, stipulations, motions, mandates of the supreme court, bills of exception, petition for removal, affidavit for removal, undertaking for removal, and order for removal, constituting the judgment-roll and the whole thereof, and being a copy of the record in said action in the case of J. H. Fisk, plaintiff, and D. V. B. Henarie *et al.*, defendants, have been by me compared with the originals thereof, and that they are true and correct transcripts of such original pleadings, papers, orders, journal entries, and the whole thereof, as the same appear of record and on file at my office and in my custody.

In witness whereof I have hereunto set my hand and affixed the seal of said circuit court this 29th day of September, A. D. 1887.

[SEAL.] WM. CHURCH, JR., *Clerk.*

Endorsed: Filed Sept. 30th, 1887. R. H. Lamson, clerk, by R. B. Lamson, deputy.

203 And afterwards, to wit, on the 8th day of October, 1887, there was duly filed in said court a motion to remand in words and figures as follows, to wit:

204 In the United States Circuit Court for the District of Oregon.

JAMES H. FISK, Plaintiff, *vs.* D. V. B. HENARIE *et al.*, Def'ts. } Motion to Remand Cause.

The plaintiff, J. H. Fisk, by his attorneys, moves to remand the above-entitled cause to the circuit court of the State of Oregon, from whence it came, on the grounds that this United States circuit court has no jurisdiction in the action, neither of the subject-matter of the action nor of the defendants therein, for the reasons following:

1. Because said application for the removal of said cause was not made in time or before trial of said cause in said State court.

2. Because the petition and affidavit for the removal of said cause upon the grounds of local influence or prejudice are insufficient in that they do not set forth the facts or reasons showing said alleged prejudice or local influence.

3. That the rules of practice in said State court provide that copies of all papers filed in any cause pending in said court shall be served upon the adverse party, and that in the absence of such service such papers so filed shall be disregarded; that no service of the said papers for said removal were served upon plaintiff or his counsel, nor does the record show any service thereof.

4. Because said petition and accompanying papers filed for the purpose of removing said cause do not show a proper case for removal.

And plaintiff hereby denies the existence of any prejudice or local influence which would prevent said defendants or any of them from obtaining justice in said State court or at all; and plaintiff hereby applies to this court to examine into the truth of said affi-
davits alleging said prejudice and local influence and the
205 grounds thereof, and thereupon to direct that said action be remanded to the court whence it was removed. This motion is based upon the record and the affidavits herewith filed in support of this motion.

GEO. H. WILLIAMS,
GEO. H. DURHAM AND
H. Y. THOMPSON,
Of Attorneys for Plaintiff.

STATE OF OREGON,
County of Multnomah, } ss:

Due service of the within motion is hereby accepted, at Portland, Oregon, this 6th day of October, 1887, by receiving a copy thereof, duly certified to as such by Geo. H. Durham, of counsel for plaintiff.

JAS. K. KELLY,
Of Attorneys for Def'ts.

Filed October 8th, 1887.

R. H. LAMSON, *Clerk.*

206 And afterwards, to wit, on Wednesday, the 12th day of Oct., 1887, the same being the 5th judicial day of the regular October term of said court—present, the Honorable Matthew P. Deady, United States district judge, presiding—the following proceedings were had in said case, to wit:

207 In the Circuit Court of the United States for the District of Oregon.

JAMES H. FISK
vs.
D. V. B. HENARIE *et al.* } No. 1402. October 12, 1887.

Now, at this day, on motion of Mr. H. Y. Thompson, of counsel for the plaintiff, it is ordered that the motion to remand filed in this cause be, and the same is hereby, set for hearing on Wednesday, October 19, 1887.

208 And afterwards, to wit, on Wednesday, the 26th day of Oct. 1887, the same being the 11th judicial day of the regular October term of said court—present, the Honorable Matthew P. Deady United States district judge, presiding—the following proceedings were had in said case, to wit:

209 In the Circuit Court of the United States for the District of Oregon.

JAMES H. FISK
vs.
D. V. B. HENARIE, ELEANOR MARTIN, PETER DONAHUE, Thomas S. Martin, Edward Martin, and John D. Wilcox. } No. 1402.

OCTOBER 26, 1887.

This cause was heard upon the motion of the plaintiff to remand said cause to the circuit court of the State of Oregon for Multnomah county, from whence it came, and was argued by Mr. George H. Williams, of counsel for said plaintiff, and by Mr. James K. Kelly and Mr. John M. Gearin, of counsel for the defendants. On consideration whereof, it is ordered and adjudged that said motion be, and the same is hereby, denied.

DEADY, *J.*

Filed October 26, 1887.

R. H. LAMSON, *Clerk*,
By R. B. LAMSON, *Deputy Clerk.*

210 And afterward, to wit, on the 26th day of October, 1887, there was duly filed in said court an opinion by the court in words and figures as follows, to wit:

211 U. S. Circuit Court, District of Oregon.

WEDNESDAY, *October* 26, 1887.

JAMES H. FISK
vs.
DANIEL V. B. HENARIE, ELEANOR MARTIN, THOMAS S. Martin, Edward Martin, John Wilcox, and James M. Donahue, Annie Donahue, and Mary Ellen Von Schroeder, Executors of Peter Donahue deceased. } No. 1402.

Action to recover damages.

Motion to Remand to State Court.

(1) Truth of affidavit of prejudice or local influence.—The provision in § 2 of the act of 1887 (24 Stat., 553) authorizing the court to examine into the truth of an affidavit for removal of a case from a State court on account of prejudice or local influence applies only to cases removed before the passage of said act on the application of the plaintiff; and otherwise than this such affidavit, being not a matter of jurisdiction, but only a condition imposed on the party seeking the removal, it cannot be questioned or contradicted, nor is it necessary that the affiant should state the grounds of his belief.

(2) Who entitled to remove on account of prejudice under the act of 1887.—Subsection 3 of § 639 of the R. S., as amended by §

2 of the act of 1887, gives the right to remove a suit "in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State" to "any" defendant, being such citizen of another State, on account of prejudice or local influence, without reference to the citizenship of other persons who may be parties thereto.

(3) Judicial power of the U. S.—Controversies between citizens of different States.—The judicial power of the United States extends to "controversies" between citizens of different States, which include a "case" in which such controversy exists without reference to the citizenship of the other parties therein, and Congress may confer jurisdiction of such controversy, including the case in which it is involved, on the circuit courts, by removal or otherwise.

(4) Time of application for removal.—An application for the removal of a case from a State court, if made while the case is pending for trial, is made "before the trial thereof," within the intent of the removal acts, although there may have been any number of mistrials or trials in which the verdict was set aside or the jury disagreed.

DEADY, *J.*:

This action was removed to this court from the State circuit court for the county of Multnomah, on the petition of the defendants, Daniel V. B. Henarie and Eleanor Martin, and James M. Donahue, Annie Donahue, and Mary Ellen von Schroeder, the executors of the last will and testament of Peter Donahue, deceased, filed July 30, 1887, together with their bond, in form and effect as required by law, and the affidavit of said Henarie and Eleanor Martin to the effect that they and each of them have reason to and do believe "that from prejudice and local influence" the affiants and said executors "will not be able to obtain justice in said State court or in any other State court to which said defendants under the laws of the State of Oregon have the right to remove the same, on account of such prejudice and local influence." The plaintiff now moves to remand the case to the State court for substantially the reasons following:

(1) The application for removal was not made in time or before the trial in the State court.

(2) The affidavit does not state the facts showing the existence of "local prejudice or influence."

(3) The removal papers were not served on the plaintiff.

(4) The petition and accompanying papers do not show a case for removal.

The motion concludes with a denial of the existence of the alleged "prejudice and local influence," and asks the court to examine into the truth of the affidavit asserting the same and the grounds thereof, and to that end the plaintiff offers to read the affidavits of sundry persons who state that they do not believe in the existence of such prejudice or local influence.

It appears from the record that this action was commenced in

Wasco county on November 30, 1883, against Daniel V. B. Henarie, Peter Donahue, Eleanor Martin, Thomas S. Martin, Edward Martin, and John D. Wilcox to recover a commission of 10 per centum, amounting to $60,000, on the alleged sale of a tract of land belonging to said parties known as the Dalles military road grant, containing about 600,000 acres and situate in the counties of Wasco, Grant, and Baker, in Oregon.

The first three of the defendants were then residents and citizens of California, and the latter three of Oregon. Service of the summons was had on the Oregon defendants, and they appeared and answered. Thereafter, on February 2, 1884, publication of the summons was ordered in the case of the California defendants, who on August 21, 1884, appeared and answered. The answers of the defendants controvert the allegations on which the plaintiff bases his demand, and contests his right to recover anything from them or either of them on any sale of said lands.

On September 1, 1884, the plaintiff replied to the answers, and on the 10th of the same month, on the application of the defendants, the place of trial was changed to Multnomah county, it appearing that none of the parties lived in Wasco county, and that the Oregon defendants, as well as the plaintiff, lived in Multnomah county.

Afterwards the case was tried with a jury in the circuit court for said county, who, on April 15, 1885, found a verdict, under the direction of the court, for the defendants, on which there was a judgment for costs in their favor; which judgment was, on January 11, 1886, reversed by the supreme court and a new trial ordered, that resulted, on May 21, 1886, in a verdict for the plaintiff for the sum of $60,000.

On May 18th the death of the defendant, Peter Donahue, was suggested, and his executors, James M. Donahue, Annie Donahue, and Mary Ellen Schroeder, substituted as defendants. Afterward the case was heard on the motion of plaintiff for judgment and the motions of the defendants for a new trial and a judgment notwithstanding the verdict, and on, June the 30th the first motion was denied and the latter allowed, on the ground that the complaint did not state facts sufficient to constitute a cause of action; and thereupon judgment was entered for costs in favor of the defendants; which judgment was, on October the 20th, reversed by the supreme court and the case remanded for further proceedings according to law.

On December the 18th the circuit court allowed the motion for a new trial and set aside the verdict, from which order the plaintiff appealed to the supreme court, which appeal was, on April 18, 1887, dismissed, and thereafter the case was again submitted to a jury, who, being unable to agree, were on July the 15th discharged without finding a verdict.

The act of March 2, 1867 (14 Stat., 558), gave right of removal of a suit from a State court to a national one, "in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State," on the affidavit of the

latter, "whether he be plaintiff or defendant," that he has reason to believe and does believe that from prejudice or local influence he will not be able to obtain justice in such State court, provided he files a petition for such removal "at any time before the final hearing or trial of the suit."

Section 639 of the Revised Statutes contains a compilation of the statutes on the subject of removals passed prior thereto. Subsection 3 thereof took the place of the act of 1867. In its compilation the word "controversy" was dropped and the right of removal limited to a "suit" between a citizen of the State in which it is brought and a citizen of another State; and the petition and affidavit were required to be filed at any time "before the trial or final hearing of the suit."

By the act of March 3, 1875 (18 Stat., 470), § 639 of the Revised Statutes was repealed, except subsection 3 thereof. The last two clauses of the section, regulating the manner of removal, were also held to remain in force for the purpose of removals under said subsection, the same not being provided for in the act of 1875. Baltimore & Ohio R'y *v.* Bates, 119 U. S., 467.

The act of March 3, 1887 (24 Stat., 552), purports to be amendatory of that of 1875 "and for other purposes."

Considering the importance of the subject and the high character of the body that enacted it, to say the least, it is a very unskillful and slovenly piece of legislation. It contains (§§ 5 and 6) a general repealing clause "of all laws and parts of laws in conflict" with itself, and several special ones and sundry saving clauses, in which no mention is made of § 639 of the Revised Statutes; but § 2 of the act contains subsection 3 of said section in a modified form, and so far repeals the latter by implication.

It reads as follows: "And where a suit is now pending or may be hereafter brought in any State court, in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State, any defendant, being such citizen of another State, may remove such suit into the circuit court of the United States for the proper district, at any time before the trial thereof, when it shall be made to appear to said circuit court that from prejudice or local influence he will not be able to obtain justice in such State court, or in any other State court to which the said defendant may, under the laws of the State, have the right, on account of such prejudice or local influence, to remove said cause: Provided, that, if it furthe- appear that said suit can be fully and justly determined as to the other defendants in the State court without being affected by such prejudice or local influence, and that no party to the suit will be prejudiced by a separation of the parties, said circuit court may direct the suit to be remanded, so far as relates to such other defendants, to the State court, to be proceeded with therein."

Then follows an independent temporary provision, intended to apply to suits pending in the circuit courts which had then been removed from the State courts under subsection 3 of §
212 639 of the Revised Statutes, "on the affidavit of any party

plaintiff" therein, on account of prejudice or local influence, which authorizes the circuit court at any time before trial, on the application of the other party, to "examine into the truth of said affidavit and the grounds thereof," and to remand the case, unless the statement appears to be true.

Thus it appears that by the act of 1887 the pendency of a suit in which there is a "controversy" between citizens of different States is again made the ground of removal, as in the act of 1876, in cases of prejudice or local influence, while the right to have such removal is confined to the "defendant." The clause concerning an examination into the truth of the affidavit for removal, when made by the "plaintiff," has no application to a removal had under the act, and which did not take place before the passage of the same, under subsection 3 of § 639 of the Revised Statutes.

In the case of a removal under this subsection, the party seeking it is required to make an affidavit to the effect that he believes he cannot obtain justice in the State court, on account of prejudice or local influence. The act of 1887, however, only provides that such fact "shall be made to appear" to the circuit court, but as to when or how it shall be made to appear or how such removal may be effected it is silent. This class of cases is expressly excepted from the operation of § 3 of the act prescribing the mode of removal thereunder generally. It follows that so much of § 639 of the Revised Statutes as relates to the method of removal on account of prejudice or local influence and the proof thereof is not in conflict with the act of 1887 and is therefore still in force and applicable to such removal. And thus, in the mode provided by statute, it appears to the court, from the affidavits of the defendants Henarie and Eleanor Martin, that from prejudice and local influence the defendants will not be able to obtain justice in the State courts. It is sufficient that they have made oath that they so believe, without setting forth the facts or circumstances on which such belief is founded. Meadow V. M. Co. *v.* Dodds, 7 Nev., 147. See also Bowen *v.* Chase, 7 Blatch., 255.

It was competent for Congress to have authorized the removal of the case on the diverse citizenship of the parties alone. But it has seen proper to require in addition the oath of the applicant for removal that he believes he cannot obtain justice in the State tribunal on account of prejudice or local influence. Any fact the existence of which is made a condition precedent to the removal of a case and which is also necessary to the jurisdiction of the circuit court may be controverted by the party against whom such removal is had. But the proper mode of doing this is not by affidavits, but by a dilatory plea in the nature of a plea to the jurisdiction, on which the qustion may be submitted to a jury for determination. McDonald *v.* Salem Flour Mills Co., 31 Fed. Rep., 578; Coal *v.* Blatchford, 11 Wall., 177.

But the affidavit of the defendants concerning their belief as to their ability to obtain justice in the State tribunals is not a jurisdictional matter, but only a condition precedent to their right of removal, the same as the oath to a demurrer, required by the equity rule 34 as a condition precedent to filing the same—"that it is not

interposed for delay:" and in my judgment, when such affidavit is made and filed in the manner and terms prescribed by the statute, the condition is performed, and the truth of the matter is not open to question. No case has been found in which it has been allowed or even attempted; and the action of Congress in providing specially in the act of 1887 for examining into the truth of the affidavit in pending cases where the removal was had on the affidavit of the "plaintiff" is a legislative construction of the act to the same effect.

In a suit between a citizen of the State in which it is brought and a citizen of another State subsection 3 of § 639 of the Revised Statutes gave the lat-er, whether he was plaintiff or defendant, the right of removal. The courts following the narrow construction given to the same language in §§ 11 and 12 of the judiciary act of 1789 (Beardsley *v.* Loney, 4 Wash., 286; Smith *vs.* Rines, 2 Sum., 338; Hubbard *vs.* Northern Railway Company, 3 Blatch., 84; Wood *vs.* Davis, 18 How., 467; Coal *vs.* Blatchford, 11 Wall., 172) held that, although the designation of the party plaintiff or defendant is in the singular number, it was intended to embrace all the persons who were on one side of the controversy, so that if either of two or more parties plaintiff were citizens of the same State with either of two or more parties defendant the case could not be removed.

As the law then stood, before the passage of the act of 1887, this action could not have been removed to this court by either of the defendants, for some of them are citizens of Oregon, the same State as the plaintiff.

But by the act of 1887 the foundation of the right of removal is not the mere pendency of a suit in a State court between a citizen of the State in which it is brought and a citizen of another State. It is enough if there is a suit pending in such court "in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State;" and while the right to remove such suit is in effect thereby denied to the plaintiff, it is not given to the defendant collectively, but to "any" one of them who "is a citizen of another State."

These material changes in the language of the statute can only be considered, under the circumstances, as showing an intention on the part of Congress to restore the act of 1867 in this respect as it was before the compilation of the Revised Statutes. It is no longer necessary that the "suit" should be between persons of diverse citizenship. It is sufficient if there is a "controversy" involved in the suit between two such persons—the one being a citizen of the State in which it is brought—whatever may be the citizenship of the other plantiffs or defendants. Nor can the right of removal thus given to "any" defendant having the prescribed citizenship *cannot*, with any respect for the ordinary significance of language, be construed to include "all" the defendants and so be denied to "any" unless "all" have such citizenship.

In support of the contrary view of the matter it is urged that the act of 1887 is a piece of what may be called "confederate" legislation, in which there is a manifest purpose to restrain and limit the authority of the national courts, and therefore it is not likely that

it was intended to enlarge their jurisdiction in this class of cases. That such appears to be the general character of the act may be admitted. But it appears to be a piece of patchwork, in which probably a number of hands were engaged, with doubtless somewhat diverse purposes. But be this as it may, no court would be warranted on the strength of such a suggestion or circumstance in construing the phrase "any" defendant to mean "all" the defendants, be they more or less.

Admitting this to be the proper construction of the statute, counsel for the plaintiff insists that it is unconstitutional.

The question whether Congress has the power to provide for the removal of a case from a State to a national court, in which some of the necessary parties defendant are citizens of the same State with the parties plaintiff or some of them, has not been directly decided by the Supreme Court. It was argued before that tribunal with marked ability and research in the case of the Sewing Machine Companies, 18 Wall., 553. But as the court held that Congress had not then undertaken to confer such power on the circuit courts it was not decided.

Mr. Dillon (Removal of Causes, § 27) is clear that the judicial power of the United States includes such cases, and therefore Congress may confer jurisdiction over them on the circuit courts by the process of removal or otherwise. In Lockhart *v.* Horn, 1 Woods, 628, Mr. Justice Bradley, in considering a case brought in the circuit court under § 11 of the judiciary act of 1789, said: "Were this an original question I should say that the fact of a common State citizenship existing between the complainants and a part only of the defendants, provided the other defendants were citizens of the proper State, would not oust the court of jurisdiction. It certainly would not under the Constitution. The case would still be a controversy between citizens of different States."

The Constitution (art. 3, § 2) provides: "The judicial power shall extend to all cases in law and equity arising under the Constitution of the United States and treaties made or which shall be made under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States, and between a State or the citizens thereof and foreign States, citizens, or subjects."

The change in the language of this section from the use of the term "cases" to "controversies" is apparently deliberate and premeditated, and in the case of an instrument so carefully prepared and considered as the Constitution of the United States cannot be regarded as fortuitous or without special significance. In my judgment it was intended by the use of the terms "cases" and "controversies" to distinguish between an ordinary action or suit which may include many parties plaintiff or defendant and involve the examination and consideration of more than one item of dispute or

controversy and so much and such part of such proceeding as may only constitute a controversy between two or more of said parties who are citizens of different States. There may be a controversy in a case which is less than the whole of it. Both the act of 1875 and that of 1878 (§ 2) make express provision for the removal of a case—the whole case—in which there is a separate controversy between citizens of different States.

213 A controversy between citizens of different States is none the less such a controversy because they are not the only parties to it. A controversy in the contemplation of the Constitution is but a dispute concerning rights or wrongs cognizable by law and which may therefore be the subject of an action or involved therein. To confine the operation of the words "controversies between citizens of different States" to cases wherein the controversy is exclusively between citizens of different States is to interpolate a word into the grant of judicial power which materially limits and restrains its operation. As well might it be claimed that the judicial power extends "to all cases affecting ambassadors, other public ministers and consuls" and them only. Then a suit might be brought in a State court against or affecting a foreign minister and Congress would be powerless to authorize its removal if the plaintiff took the precaution, as he doubtless would, to make some third person a codefendant. What the effect of such a state of things would be on the relations of the United States with other governments may be easily imagined. The extension of the judicial power over a controversy between citizens of different States is not to be rendered nugatory by the accidental circumstance that it forms a part of or is involved in a suit between citizens of the same State. On the contrary, the jurisdiction in such cases must be held to include all the incidents which inhere in or attach to the controversy. "Congress has power to make all laws which shall be necessary and proper to carry into execution" the grant of judicial power (Con. U. S., art. I, § 8), and thus make it equal to the great and beneficent purpose for which it was intended, and in so doing may, in my judgment, confer jurisdiction on the circuit courts of a case involving a controversy, whether separable or not, between citizens of different States, by removal or otherwise; and this, although some of the parties plaintiff and defendant in the suit are citizens of the same State.

The grant of judicial power is one of the most effective means by which the framers of the Constitution undertook to "form a more perfect union" between the people of the several States and to protect them in their interstate intercourse and business from the danger of injustice growing out of State prejudice and local influence.

Hamilton, in the Federalist (No. 80), in discussing this subject says: "In order to the inviolable maintenance of that equality of privileges and immunities to which the citizens of the Union will be entitled the national judiciary ought to preside in all cases in which one State or its citizens are opposed to another State or its citizens. To secure the full effect of so fundamental a provision

against all evasion or subterfuge it is necessary that its construction should be committed to that tribunal, which, having no local attachments, will be likely to be impartial between the different States and their citizens, and which, owing its official existence to the Union, will never be likely to feel any bias inauspicious to the principles on which it is founded."

The mere fact that there are parties defendant in this case who are citizens of the same State with the plaintiff ought not to weigh against this conclusion, for so far as they are concerned it ought not to be a matter of any moment in which tribunal the case is is tried, for, as was said by Mr. Justice Miller in Trust Co. *v.* Macquillan, 3 Dill., 381, "The object in each case is to secure an impartial tribunal, and the Federal courts are not courts for non-residents more than for residents."

But to compel non-residents to litigate a controversy with a resident in a court of his State because other residents of such State are, either from policy or necessity, joined with him as defendants is to compel him to submit to the judgment of a presumably partial tribunal.

And if it was doubtful how this question ought to be decided it would be proper to rule against the plaintiff. The act of 1878 allows a party moving to remand a cause the right to take the question to the Supreme Court, but denies it to his adversary.

Was the application to remove the case made in time? It will assist in the examination of the decisions on this question to group together the language of the various acts on the subject.

Under the act of 1866 (14 Stat., 356) the application for removal was required to be made "before the trial or final hearing." In the act of 1867 the language was changed to "final hearing or trial." Section 639 of the Revised Statutes, which contains a compilation of these two acts, went back to the language of the act of 1866—"before the trial or final hearing of the suit." The act 1875 required the application to be made "before or at the term at which said cause could be first tried and before the trial thereof." This cause was removed under subsection 3 of § 639, which requires the application to be made "before the trial or final hearing of the suit."

The following are the principal cases arising under these acts on the question of the time of removal:

Dart *v.* McKinney (9 Blatch., 359) was a case of removal under the act of 1866. A judgment was given in the State court on the report of a referee against the defendants, which was reversed and a new trial granted; whereupon one of the defendants removed the cause; and on a motion to remand it was held that the act gave the right of removal "at any time before the trial or final hearing of the cause," and not at any time before a trial or final hearing of the cause."

Insurance Co. *v.* Dunn (19 Wall., 214) was removed under the act of 1867. The case was first tried in a court of the State of Ohio, where there was a verdict against the company. The law of the State gave the latter a right to a new trial on giving bond to abide

and perform the judgment of the court, which it did, and then removed the case to the circuit court.

In the progress of the same it was taken to the Supreme Court on the question of whether the removal was taken in time, where it was decided in the affirmative. It was held that the adjective "final" applied to "trial" as well as "hearing," it being understood before the former, and some weight was given to this circumstance. The conclusion of the court was this: "It was intended to permit the removal at any time before a hearing or trial final in the cause as it stood when the application for the transfer was made." See also Stevenson *v.* Williams, 19 Wall., 575.

In Vannever *v.* Bryant (21 Wall., 41) there was an application for removal under the act of 1876. The case was this: A trial and verdict was had in the State court. The defendants moved for a new trial, and pending this motion the non-resident defendants applied for a removal, which was refused, and on this ruling the case went to the Supreme Court. The ruling was affirmed on the authority of the Sewing Machine Cases, 18 Wall., 553. In delivering the opinion of the court the Chief Justice also said that the application was also properly refused because the case was not then pending for trial, and added: "After one trial the right to a second must be perfected before a demand for the transfer can be properly made. Every trial of a cause is final until, in some form, it has been vacated."

Jifkins *v.* Sweetzer (102 U. S., 177) was removed under the act of 1866, and afterwards remanded to the State court. From the order remanding the case an appeal was taken to the Supreme Court, where the same was affirmed.

This was a suit for an account of rents and profits in which there was a decree in the common pleas dismissing the bill. On an appeal to the supreme court of the State this decree was reversed, the bill reinstated, and the common pleas instructed to refer the case to a master to take an account for the purpose of making "a final decree in the premises according to equity." Two years after the reference, but before any report was filed, the defendant applied to have the case removed to the circuit court.

The Supreme Court held that the hearing in the State supreme court was a final one, and that nothing remained to be done but to continue the same "until the necessary accounts could be taken and the details of a final decree settled," and therefore the application was too late. In the course of the opinion Mr. Justice Miller said the hearing of the case was taken up by the Supreme Court on the appeal from the common pleas. "If on the appeal the decree below had been reversed and the cause sent back for a rehearing, then the final hearing for the purposes of the statute now under consideration would not have begun until the court below had again entered upon the determination of the cause."

Alley *v.* Knott (111 U. S., 472) was commenced in a State court of New York and removed on the petition of Alley, one of the defendants, under the act of 1875, to the circuit court, where a motion to remand was allowed. From this ruling an appeal was taken to the

supreme court, where the decision of the circuit court was affirmed on the ground that the application for the removal came too late.

The case was this: Alley and other defendants demurred to the complaint in the State court because it did not state facts sufficient to constitute a cause of action, which demurrers were overruled, with leave to the defendants to withdraw their demurrers and answer within a time prescribed, which was done, and on the day following the petition for removal was filed.

The question argued before and decided by the court is that the trial of an issue of law, such as arises on a demurrer to a complaint for the cause specified, is "a trial of the action within the meaning of the act of 1875." In the course of his opinion the Chief Justice remarked that the State court, before entering a final judgment on the demurrer, granted a new trial with leave to amend the pleadings;" and then said, *arguendo:* "The situation of the case at this time, for the purpose of removal, was precisely the same as it would be if the trial, instead of being on an issue of law involving the merits, had been on an issue of fact to the jury, and the court had, in its discretion, allowed a new trial after verdict. We
214 can hardly believe it would be claimed that a removal could be had in the last case, and, in our opinion, it cannot in the first."

Baltimore & Ohio R'y *v.* Bates (119 U. S., 464) was an action brought in a court of common pleas in Ohio against the railway company. A general demurrer to the petition was sustained by the court and judgment given for the defendant. Afterwards this judgment was reversed by the district court and the case remanded to the common pleas for further proceedings. There the defendant filed a petition for removal under subsection 3 of § 639 of the Revised Statutes, on the ground of prejudice and local influence, and offered security such as is prescribed by said section, rather than the act of 1875. For this reason the petition was denied and the case went up the long ladder of appeals, with varying fortune, until it reached the supreme court of the State, where the refusal to allow the removal was affirmed. From there the case was taken to the Supreme Court, where the judgment of the State court was reversed.

The argument of counsel for Bates appears to have been principally devoted to the sufficiency of the security, and the court held that it was properly given under § 639 of the Revised Statutes; but the question of whether the petition was filed in time was also presented and decided. The Chief Justice disposed of it as a matter scarcely open to argument in these words: "This petition was filed after a new trial had actually been granted and while the cause was pending in the trial court for that purpose. It was, therefore, in time, and no objection is made to its form."

This is the latest case in the Supreme Court on this question to which my attention has been attracted. It expressly decides that, under subsection 3 of § 639 of the Revised Statutes, *that* while a cause is pending for trial in the State court a petition for its removal is in time, without reference to the number of trials or mistrials that may have been had in it before.

The suggestion of the learned Chief Justice to the contrary, in Alley *v.* Nott, *supra*, on which the plaintiff seems to rely, must yield to this direct decision of the court announced by himself.

There is no other authority that gives any countenance to the proposition that the phrase "before the trial," as used in any of these removal acts, means any proceeding other than that which results in a verdict of judgment, subsisting and in force when the application is made. Where the word "trial" is qualified by the word "final," as in the act of 1867, this conclusion is inevitable; but even in the acts of 1886 and 1875 and § 639 of the Revised Statutes, where the phrase used is simply "before the trial," the language fairly construed means, as Mr. Justice Blatchford said in Dart *v.* McKinney, *supra*, "the trial of the case, and not a trial of it." In the nature of things the trial of the case is not any one, but the final one—the one that stands as a thing accomplished in the case.

Where a jury is discharged without a verdict, the proceeding is properly known as a mistrial; and where a verdict is set aside because it ought not to stand, the result is the same. The proceeding has miscarried and the consequence is not a trial but a mistrial.

And in the case of a removal for prejudice or local influence there is a good reason for giving the non-resident party a right to make the application after a mistrial, for, as was said by Mr. Justice Miller, in Hess *vs.* Reynolds (13 Wall., 80), "the hostile local influence may not become known or developed at an earlier stage of the proceeding."

In Spear's Law of the Federal Judiciary (468), after an examination of the cases on the subject, the author says that whenever a verdict is set aside or the jury disagree the weight of authority is that the case is restored to the status it had before any trial took place, and adds: "The theory on which this view rests is that the first trial, being wholly vacated or resulting in a disagreement of the jury, was a nullity, and hence the case stands, as to the right of removal, just as it would have stood if no such trial had been had."

It does not appear that the resident defendants desire this case remanded as to them or at all. It would be so much additional expense and trouble to the plaintiff to try it in two parts in different courts.

The motion to remand is denied.

Mr. George H. Williams, for the plaintiff.

Mr. James K. Kelly and Mr. John M. Gearin, for the defendants.

(Signed) MATTHEW P. DEADY,
U. S. District Judge.

(Endorsed:) Filed Oct. 27, 1887. R. H. Lamson, clerk.

215 And afterwards, to wit, on Tuesday, the 22d day of November, 1887, the same being the 32d judicial day of the regular October term of said court—present, the Honorable Matthew P. Deady, United States district judge, presiding—the following proceedings were had in said case, to wit:

216 In the Circuit Court of the United States for the District of Oregon.

JAMES H. FISK
vs.
D. V. B. HENARIE *et al.* } No. 1402.

NOVEMBER 22, 1887.

Now, at this day, comes the plaintiff, by Mr. H. Y. Thompson, of counsel, and the defendants, by Mr. William B. Gilbert and Mr. John M. Gearin, of counsel, and on motion of said plaintiff it is ordered that this cause be, and the same is hereby, set for trial on Thursday, December 15, 1887.

217 And afterwards, to wit, on Thursday, the 15th day of December, 1887, the same being the 50th judicial day of the regular October term of said court—present, the Honorable Matthew P. Deady, United States district judge, presiding—the following proceedings were had in said case, to wit:

218 In the Circuit Court of the United States for the District of Oregon.

JAMES H. FISK
vs.
D. V. B. HENARIE *et al.* } No. 1402.

DECEMBER 15, 1887.

Now, at this day, comes the plaintiff, by Mr. George H. Williams, Mr. H. Y. Thompson, and Mr. George H. Durham, of counsel, and the defendants, by Mr. James K. Kelly, Mr. John M. Gearin, and Mr. William B. Gilbert, of counsel; and, this being the day set for the trial of this cause, now comes the following-named jurors to try the issue joined, viz: C. S. Chase, Thomas Huston, John Craig, C. Stevenson, McM. Dodson, Matt. Small, A. W. Stowell, George Patterson, Hugh Cosgrove, L. K. G. Smith, W. C. Woodcock, and F. M. Lewis, twelve good and lawful men of the district, who, being duly empanelled and sworn, proceed to hear the evidence adduced; and, the hour of adjournment having arrived, this cause is continued till to-morrow.

219 And afterwards, to wit, on Friday, the 16th day of December, 1887, the same being the 51st judicial day of the regular October term of said court—present, the Honorable Matthew P. Deady, United States district judge, presiding—the following proceedings were had in said case, to wit:

220 In the Circuit Court of the United States for the District of Oregon.

JAMES H. FISK
vs.
D. V. B. HENARIE *et al.* } No. 1402.

DECEMBER 16, 1887.

Now, at this day, comes the plaintiff and the defendants, by their counsel as of yesterday, and, the jury empanelled herein being present and answering to their names, the trial of this cause proceeds; and, the hour of adjournment having arrived, the trial of this cause is continued until to-morrow.

221 And afterwards, to wit, on Saturday, the 17th day of December, 1887, the same being the 52d judicial day of the regular October term of said court—present, the Honorable Matthew P. Deady, United States district judge, presiding—the following proceedings were had in said case, to wit:

222 In the Circuit Court of the United States for the District of Oregon.

JAMES H. FISK
vs.
D. V. B. HENARIE *et al.* } No. 1402.

DECEMBER 17, 1887.

Now, at this day, comes the plaintiff and the defendants, by their counsel as of yesterday, and, the jury being present and answering to their names, the trial of this cause proceeds; and the jury, having heard the evidence adduced, the arguments of counsel, and the instructions of the court, retire in charge of proper sworn officers to consider of their verdict, and, after being out a short time, return into court the following verdict, viz: "We, the jury in the above-entitled cause, find for the defendants—Meminn Dodson, foreman;" and, in answer to the following question submitted by the court, "When the contract of October 4, 1887, between the defendants and Leigh, Payne and Company concerning the purchase and sale of the lands mentioned in the pleadings, was it the understanding that the commission agreed to be paid Fisk was then due and payable to him or not until the purchase-money or bonds was received by the defendants?

"We, the jury, in answer to the foregoing question, find that the commission to be paid to Fisk on the sale to Leigh, Payne and Company *because* due and payable when the land is sold and the money paid;" which verdict and question are received by the court and ordered to be filed.

223 And afterwards, to wit, on the 17th day of December, 1887, there was duly filed in said court a verdict in words and figures as follows, to wit:

224 In the Circuit Court of the United States for the District of Oregon.

JAMES H. FISK, Plaintiff,
vs.
D. V. B. HENARIE, ELEANOR MARTIN, PETER DONAHUE, THOS. S. MARTIN, EDWARD MARTIN, and JNO. D. WILCOX, Defendants.

We, the jury in the above-entitled cause, find for the defendants.

McMINN DODSON, *Foreman.*

225 U. S. Circuit Court.

JOHN H. FISK
vs.
D. V. B. HENARIE.

DECEMBER 17, 1887.

Question submitted to the jury on which to make a special finding:

When the contract of October 4, 1887, between the defendants and Leigh, Payne and Company concerning the purchase and sale of the lands mentioned in the pleadings, was it the understanding that the commission agreed to be paid Fisk was then due and payable to him or not until the purchase-money or bonds was received by the defendants?

We, the jury, in answer to the foregoing question, find that the commission to be paid to Fisk on the sale to Leigh, Payne and Company became due and payable when the land is sold and the money paid.

McMINN DODSON, *Foreman.*

Filed December 17, 1887.

R. H. LAMSON, *Clerk,*
By R. B. LAMSON, *Deputy.*

226 And afterwards, to wit, on Monday, the 19th day of December, 1887, the same being the 53d judicial day of the regular October term of said court—present, the Honorable Matthew P. Deady, United States district judge presiding—the following proceedings were had in said case, to wit:

227 In the Circuit Court of the United States for the District of Oregon.

JAMES H. FISK
vs.
D. V. B. HENARIE *et al.* } No. 1402.

DECEMBER 19, 1887.

Now, at this day, come the defendants, by Mr. William B. Gilbert, of counsel, and moves the court for judgment upon the verdict heretofore found herein, whereupon it is considered that said defendants go hence without day, and that they have and recover off

and from the plaintiff their costs and disbursements herein, taxed at six hundred and four and $\frac{95}{100}$ dollars.

228 And afterwards, to wit, on the 22nd day of December, 1887, there was duly filed in said court a cost bill in words and figures as follows, to wit:

229 In the Circuit Court of the United States for the District of Oregon.

FEBRUARY 14, 1888.

Objections 1, 2, 4, 5, 6, 7, and 12 sustained.
Objections 3, 8, 9, 10, 11, 13, 14, and 15 overruled.

R. H. LAMSON, *Clerk.*

Jas. K. Kelly, for plaintiff.
R. G. Morrow, for defendant-.

Both plaintiff and defendant- appeal from the ruling of the clerk to the court.

R. H. LAMSON, *Clerk.*

FEBRUARY 20, 1888.

Objections heard by the court, and costs ordered to be taxed at $408.23.

R. H. LAMSON, *Clerk,*
By R. B. LAMSON, *Deputy.*

230 In the Circuit Court of the United States for the District of Oregon.

JAS. H. FISK, Pl'ff,
vs.
D. V. B. HENARIE *et al.*, Def'ts. } Objections to Cost Bill.

Now comes the pl'ff, by his attorneys, and objects to the following items of the cost bill heretofore filed by the def't- herein:

In the cost bill filed in the circuit court of the State of Oregon for Multnomah county on the 15th of April, 1885, and made part of the cost bill filed in this court—

1. Plaintiff objects to all but $56.40 of the item $115.00 for depositions, because the legal fees for taking the amount of testimony in those depositions is $56.40 and no more.

2. To all the item, attorney fee, $10.00, because the judgment for which said fee is claimed was reversed by the supreme court of Oregon, so that defendants were not the prevailing party in the action, and because after removal to the Federal court the prevailing party is not entitled to costs that accrued under the State law prior to the removal.

3. Plaintiff objects to all the item, T. S. Martin, one day and milage, $2.40, because said Martin is a defendant in this action, and as such ought not to recover either witness fees or milage.

4. To all the item, referee's fees, $151.00, because no referee has

ever performed any service in this case, and because that item is an error in the transcript from the State court.

5. To all the item, disbursements, $10.55, because the claim is not itemized and because it is an error in the transcript from the State court.

231 In the cost bill filed in the circuit court of Oregon for Multnomah county July 1st, 1886, and made part of the bill of disbursements in this court—

6. Plaintiff objects to all but $5.80 of the item, last deposition of J. Studdy Leigh, $25.00, because the legal fees for taking the amount of testimony in the deposition is $5.80 and no more.

7. To all the item, attorney's fee, $10.00, for the same reasons assigned in objection 2 above.

8. To $8.40 of the item, witness fees, $60.40, because Edward Martin and Thos. S. Martin, for each of whom $4.20 is charged, are both defendants in this action.

9. To all but $80.00 of the item, cost bill on former trial, $140.45, because only $80.00 of that item is a proper or legal claim.

10. To all the item, H. H. Parker, one-half stenographer's fees, $29.00, because said charge is for extending stenographic notes after trial for the use of the defendants at their special instance and request.

In the cost bill filed in this court December 22, 1887—

11. Plaintiff objects to all but $165.95 of the item, costs in State court, taxed in cost bill, filed July 1st, 1886, $264.85, because only $165.95 of that amount ought to be allowed.

12. To the item, depositions—Leigh, $25.00; Oviatt, $65.00; Henarie, 10.00—$100.00—plaintiff resists all but $6.10 of the subdivition, Leigh, $25.00, for the reasons assigned in objections 1 and 6; to all but $8.50 of the subdivition, C. P. Oviatt, $65.00, because the legal fees for taking the amount of testimony contained in that deposition amount to $8.50 and no more; to all but $2.10 of the subdivition, Henarie, $10.00, because the legal fees for taking the amount of testimony in that deposition amount to only $2.10.

232 13. To all the item, witness fees, Edward Martin, two days and milage, $3.20, because said Martin is a defendant in this action.

14. Plaintiff objects to $76.00 of the item, J. Studdy Leigh, travel and witness fees, $79.00, because said Leigh voluntarily attended from another district and without a subpœna.

15. Plaintiff objects to all the items, P. J. Martin, 220 miles circular travel in Oregon, $22.00, and T. B. Beach, 220 circular miles travel in Oregon, $22.00—$44.00, because both those witnesses voluntarily attended from another district without a subpœna.

GEO. H. DURHAM,
R. G. MORROW,
Attorneys for Pl'ff.

Filed February 1st, 1888.

R. H. LAMSON, *Clerk.*

233 In the Circuit Court of the United States for the District of Oregon.

JAMES H. FISK, Plaintiff,
vs.
D. V. B. HENARIE *et al.*, Defendants.

Statement of disbursements claimed in the above-entitled cause, viz.:

Clerk's fees	$23 40
Marshal's fees	
Costs in State court, taxed in cost bill, filed July 1, 1886	264 85
Advertising	
(see on back of this)	
Depositions—J. S. Leigh, C. P. Oviatt & D. V. B. Henarie)	100 00
Attorney's fee	20 00
Attorney's fee for taking 3 depositions, at $2.50 each	7 50
Stenographer's fees, John W. Cockran, ½ on last trial in State court	20 00
Stenographer's fees, George A. Brodie, ½ for 3 days	15 00
Disbursements, Wm. Church, jr., transcript on removal	72 00
Witness' fees, Edward Martin, 2 days and mileage	3 20
" " J. Studdy Leigh, 2 days as a witness & 760 miles travel from San Francisco	79 00
	$604 95

Taxed at $408.23.

R. H. LAMSON, *Clerk.*

Total, $408.23.

234 Since filing cost bill in State court:

1887, June 14, taking J. S. Leigh's deposition	$25 00
1887, June 22, taking C. P. Oviatt's deposition	65 00
1887, Dec. 7, taking D. V. B. Henarie's deposition	10 00
	$100 00

235 DISTRICT OF OREGON, *ss:*

I, James K. Kelly, being duly sworn, say I am the attorney for the defendants in the above-entitled cause; that the costs and disbursements set forth above have been necessarily incurred in the prosecution of this suit, and that defendants are entitled to recover the same from the plaintiff.

JAMES K. KELLY.

Subscribed and sworn to before me this twenty-second —, 1887.

R. H. LAMSON, *Clerk.*

Filed December 22, 1887.

R. H. LAMSON, *Clerk.*

236 Afterwards, to wit, on the 28th day of January, 1888, there was duly filed in said court a motion for new trial in words and figures as follows, to wit:

237 In the United States Circuit Court for the District of Oregon.

J. H. FISK, Plaintiff,
vs.
D. V. B. HENARIE *et al.*

Motion for New Trial.

The plaintiff moves the court to set aside the verdict of the jury heretofore rendered in the above-entitled action and for a new trial herein for the following reasons:

1. The court has no jurisdiction of the parties or of the subject-matter of said action.

2. For error of the court in denying plaintiff's motion to remand the said cause to the circuit court of the State from which the same was removed.

3. The error of the court in submitting to the jury the question of whether or not there was a modification of the contract for the payment of commissions, out of which this action arose.

WILLIAMS, DURHAM AND THOMPSON,
Plaintiff's Attorneys.

238 STATE OF OREGON, }
County of Multnomah, } *ss:*

Due services of the within motion is hereby accepted, in Multnomah county, Oregon, this 21st day of January, 1888, by receiving a copy thereof, duly certified to as such by H. Y. Thompson, attorney for plaintiff.

GEARIN, GILBERT AND J. K. KELLY,
Attorneys for Defendant.

[Endorsed:] Filed Jan. 23, 1888. R. H. Lamson, clerk, by R. B. Lamson, deputy. Williams, Durham & Thompson, attorneys for plaintiff.

239 And afterwards, to wit, on Monday, the 11th day of June, 1888, the same being the 35th judicial day of the regular April term of said court—present, the Honorable Matthew P. Deady, United States district judge, presiding—the followings proceedings were had in said case, to wit:

240 In the Circuit Court of the United States for the District of Oregon.

JAMES H. FISK
vs.
D. V. B. HENARIE *et al.* } No. 1402.

JUNE 11, 1888.

This cause was heard upon the motion filed by the plaintiff for a

new trial herein, and was argued by Mr. George H. Williams, Mr. George H. Durham, and Mr. H. G. Thompson, of counsel for said plaintiff, and by Mr. James K. Kelly and Mr. John M. Gearin, of counsel for the defendants. On consideration whereof it is ordered that said motion be, and the same is hereby, denied.

241 And afterwards, to wit, on the 11th day of June, 1888, there was duly filed in said court an opinion by the court in words and figures as follows, to wit:

242 United States Circuit Court, District of Oregon.

MONDAY, *June* 11, 1888.

J. H. FISK
v.
D. V. B. HENARIE, PETER DONOHUE, ELEANOR MARTIN, THOMAS MARTIN, EDWARD MARTIN, JOHN D. WILCOX. } No. —.

Motion for a New Trial.

Removal of cause for prejudice or local influence. The act of 1887 (24 Stat., 552) does not repeal subdivision 3 of § 639 of the R. S. (act of 1867), prescribing the procedure or method of procuring a removal of a cause on account of prejudice or local influence; and an affidavit by the party seeking such removal to the effect that he believes he will not obtain justice in the State court on account of prejudice and local influence is sufficient to authorize the same.

DEADY, *J.*:

This action was removed to this court on the petition and affidavit of certain of the defendants, who are citizens of California, on the ground of prejudice and local influence.

A motion to remand was denied (32 Fed. Rep., 417), and the cause was tried here with a jury, who, on December 17, 1887, gave a verdict for the defendants.

The plaintiff moves for a new trial, and submits the motion on the single ground that the court erred in refusing to remand the case to the State court, the other grounds of the motion being expressly waived.

Strickly speaking, this is not an error occurring at the trial, for which this motion is the proper remedy. The case may be taken to the Supreme Court on error, and the ruling of the court in this respect reviewed and, if erroneous, corrected.

But counsel ask the court to reconsider the question in the light of Mr. Justice Brewer's subsequent ruling in Short *v.* Chicago M. & St. P. Ry. (33 Fed. Rep., 114), and I am quite willing to do so.

On the argument of the present motion but one point was made, that it did not "appear" to the court from the petition and affidavit for removal, as required by the act of 1887 (24 Stat., 552), that the defendants will not, on account of prejudice or local influence, be able to obtain justice in the State court, because the probatory cir-

cumstances, on which the defendants based their statement to that effect, were not set forth in the affidavit.

In the opinion of this court, on the motion to remand, it was said that the act of 1887 does not provide how the fact of prejudice or local influence "shall be made to appear" to the court. "This class of cases is expressly excepted from the operation of section 3 of the act prescribing the mode of removal thereunder generally. It follows that so much of section 639 of the Revised Statutes as relates to the method of removal on account of prejudice or local influence and the proof thereof is not in conflict with the act of 1887, and is therefore still in force and applicable to such removal. * *

* It is sufficient that they (the defendants) have made oath that they so believe (that from prejudice and local influence they will not be able to obtain justice in the State courts), without setting forth the facts or circumstances on which such belief is founded."

It is admitted in Short *vs.* Chicago, etc., that the act of 1867 (§ 639, sub. 3, Rev. Stat.) "is not in terms repealed" by the act of 1887. But it is contended the latter act "covers the same ground and is obviously intended by the legislature to be its expressed will upon the whole subject involved therein," and therefore "although there may be some provisions in the earlier not absolutely inconsistent with those of the later act, yet the whole of the earlier act is repealed."

But, in my judgment, this deduction is founded on a misapprehension of the intention of the legislature as manifested in the act of 1887.

The plain purpose of the act, so far as the removal of causes on the ground of prejudice or local influence is concerned, is to provide who may remove a suit for such cause, and within what time, and not to prescribe the procedure or manner of taking the removal.

For instance, by the act of 1867 a suit could be removed on the petition of either party thereto, if he was not a citizen of the State in which it was brought, while the act of 1887 restricts the right to the defendant. The act of 1867 allowed a removal only in a case of "a suit" between citizens of different States, but the act of 1887 gives the right of removal to "any" defendant in a suit who is a citizen of a State other than that in which the same is brought whenever there is "a controversy" therein between himself and a citizen of any other State. Fisk *v.* Henarie, 32 Fed. Rep., 422. The act of 1867 permitted the removal to be made "at any time before the trial or final hearing of the suit," while the act of 1887 limits it to "any time before the trial thereof."

Section 3 of the act of 1887 expressly provides a method of removal in all cases within its purview, except those for prejudice or local influence, which are expressly excluded from its operation in this respect.

From these premises, it appears to me, but one conclusion can reasonably be drawn, that the act of 1887 does not and was not intended to repeal that portion of the act of 1867 contained in subdi-

vision 3 of § 639 of the Revised Statutes, which prescribes the procedure on a removal for prejudice or local influence.

Then, again, in considering this question, it is to be remembered that repeals by implication are not favored, and are never admitted where the former act can stand with the new one. Wood *v.* United States, 16 Pet., 362; *Ex parte* Yerger, 8 Wall., 105; Chew Heong *v.* United States, 112 U. S., 549.

In Wood *v.* United States, *supra*, Mr. Justice Story, speaking for the court on a question of the repeal of a statute by implication, says: "That it has not been expressly or by direct terms repealed is admitted, and the question resolves itself into the narrow enquiry whether it has been repealed by necessary implication. We say by necessary implication, for it is not sufficient to establish that subsequent laws cover some, or even all, of the cases provided for by it, for they may be merely affirmative or cumulative or auxiliary, but there must be a positive repugnancy between the provisions of the new laws and those of the old, and even then the old law is repealed by implication only *pro tanto* to the extent of the repugnancy."

In Hills *v.* Richmond (33 Fed. Rep., 81, C. C. Dis. of Georgia) Judge Hill considers this question and comes to the conclusion that the act of 1887 does not change the practice where a defendant seeks to remove a case on the ground of prejudice or local influence.

The decision in Short *v.* Chicago, *supra*, does not go so far as to hold that the affidavit must contain the facts on which the affiant bases his belief, but only that the fact of prejudice or influence must be positively stated.

The petition in this case, which is be verified by the oath of the defendant Henarie, does state the fact of prejudice and local influence positively. But the affidavit thereto is that the petition is true, as the affiant "verily believes." The affidavit for the removal, which is sworn to by the defendants Henarie and Eleanor Martin states that the affiants "have reason to believe and do believe and so state" that from prejudice and local influence the defendants will not be able to obtain justice, etc.

A duly verified petition is so far an affidavit that if it contains the necessary averments a removal may be had thereon. This petition states positively the fact of prejudice and local influence. Nor is the force of this statement affected by the fact that the defendant swears it is true as "he verily believes." Of course, what he believes to be true he may state as a fact. If he had sworn that the petition was true without saying "as I verily believe," he would have neither said nor meant anything more than "I swear it is true because I believe so."

243 In fact, the difference between saying "I believe I cannot get justice in the State court on account of prejudice and local influence" and "I cannot get justice in the State court," etc., without saying whether I believe it or not, in my humble opinion, is the difference between tweedledum and tweedledee.

The statement in the affidavit proper, in addition to the belief of the affiant, contains a positive averment of the fact of prejudice and

local influence. It is, in effect, a declaration that the affiant has reason to believe and does believe a certain fact to exist, and therefore "states" that it does. And this is equivalent to saying that the fact exists without saying that he believes it, which is understood.

I conclude, then, that the fact of prejudice and local influence is "made to appear" to the circuit court whenever it does so appear from the affidavit of the party causing the removal, and that it does so appear whenever such party states on oath that it is so or that he believes it to be so.

The motion for a new trial is denied.

Mr. George H. Williams and Mr. George H. Durham, for the plaintiff; Mr. James K. Kelly and Mr. John M. Gearin, for the defendants.

(Signed) MATTHEW P. DEADY,
U. S. District Judge, Oregon.

(Endorsed:) Filed June 11, 1888. R. H. Lamson, clerk.

244 And afterwards, to wit, on the 14th day of August, 1888, there was duly filed in said court a bond on writ of error in words and figures as follows, to wit:

245 In the United States Circuit Court for the District of Oregon.

JAMES H. FISK, Plaintiff, *vs.* D. V. B. HENARIE, ELEANOR MARTIN, THOMAS MARTIN, EDWARD MARTIN, JOHN D. WILCOX, JAMES M. DONAHUE, ANNIE DONAHUE, and MARY ELLEN VON SCHROEDER, Executors of PETER DONAHUE, Deceased, Defendants.	No. 1402.

Know all men by these presents that we, James H. Fisk, plaintiff in error and principal, and Daniel McKercher and R. H. Thompson, all of Portland, district of Oregon, are held and firmly bound unto the said D. V. B. Henarie, Eleanor Martin, Thomas Martin, Edward Martin, John D. Wilcox, James M. Donahue, Annie Donahue, and Mary Ellen Von Schroeder, executors of Peter Donahue, deceased, and all said defendants in said cause, in the sum of five hundred dollars, to be paid to the said D. V. B. Henarie, Eleanor Martin, Thomas Martin, Edward Martin, John D. Wilcox, James M. Donahue, Annie Donahue, and Mary Ellen Von Schroeder, executors of Peter Donahue, deceased, their executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these present-.

Sealed with our seals. Dated this 14th day of August, 1888.

Whereas the above-named James H. Fisk hath prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the circuit court of the United States for the district of Oregon: Now, therefore, the

condition of this obligation is such, that if the above-named
246 James H. Fisk shall prosecute his writ of error to effect and answer all costs and damages if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

JAMES H. FISK.
D. C. McKERCHER.
247 R. H. THOMPSON.

Sealed and delivered in presence of—
1. GEO. H. DURHAM.
2. D. W. STEVENS.

I approve the above bond and the sufficiency of the sureties thereto.

MATTHEW P. DEADY,
U. S. District Judge.

Filed August 14th, 1888.

R. H. LAMSON, *Clerk*,
By D. W. STEVENS, *Deputy*.

248 UNITED STATES OF AMERICA, } ss:
District of Oregon, }

I, R. H. Lamson, clerk of the circuit court of the United States for the district of Oregon, do hereby certify the above and foregoing to be a true, correct, and complete transcript of the record of all the proceedings had in said court in the cause wherein James H. Fisk is plaintiff, and D. V. B. Henarie, Eleanor Martin, James M. Donahue, Annie Donahue, and Mary Ellen Von Schroeder, executors of the will of Peter Donahue, deceased; Thomas J. Martin, Edward Martin, and John D. Wilcox are the defendants, as the same appears from the files and records of said court now remaining in my custody and control.

Seal United States Circuit Court, Oregon.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Portland, in said district, this 1st day of September, A. D. 1888.

R. H. LAMSON, *Clerk*,
By R. B. LAMSON,
Deputy Clerk.

Endorsed on cover: Oregon C. C. U. S. No. 118. James H. Fisk, plaintiff in error, *vs.* D. V. B. Henarie, Eleanor Martin, James M. Donahue, Annie Donahue, and Mary Ellen Von Schroeder, executors of the will of Peter Donahue, deceased; Thomas S. Martin, Edward Martin, and John D. Wilcox. Filed September 25, 1888.

Office Supreme Court U. S.
FILED.
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JAMES H. McKENNEY,
CLERK

Supreme Court of the United States.

No. 118.

JAMES H. FISK, Plaintiff in Error,

vs.

DANIEL V. B. HENARIE, PETER DONAHUE, ELEANOR MARTIN, THOMAS S. MARTIN, EDWARD MARTIN, and JOHN D. WILCOX, Defendants in Error.

October Term, 1891.

Error to the Circuit Court of the United States for the District of Oregon.

BRIEF AND ARGUMENT ON BEHALF OF PLAINTIFF IN ERROR.

GEO. H. WILLIAMS,
GEO. H. DURHAM,
JOHN H. MITCHELL,
Attorneys for Plaintiff in Error.

PRESS OF McGILL & WALLACE,
WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1891.

JAMES H. FISK, Plaintiff in Error,
vs.
D. V. B. HENARIE *et al.* } No. 118.

Brief and Argument on part of Plaintiff in Error.

STATEMENT OF CASE.

This action was commenced in the State court of the State of Oregon, for Wasco County, on November 30, 1883, against Daniel V. B. Henarie, Peter Donahue, Eleanor Martin, Thomas S. Martin, Edward Martin, and John D. Wilcox, to recover a commission of 10 per centum, amounting to $60,000, on the alleged sale of a tract of land belonging to said parties known as the Dalles military road grant, containing about 600,000 acres and situated in the counties of Wasco, Grant, and Baker, in the State of Oregon.

The first three of the defendants were then residents and citizens of California, and the latter three of Oregon. Service of the summons was had on the Oregon defendants, and they appeared and answered. Thereafter, on February 2, 1884, publication of the summons was ordered in the case of the California defendants, who on August 21, 1884, appeared and answered. The answers of the defendants controvert the allegations on which the plaintiff bases his demand, and contests his right to re-

cover anything from them or either of them on any sale of said lands.

On September 1, 1884, the plaintiff replied to the answers, and on the 10th of the same month, on the application of the defendants, the place of trial was changed to Multnomah County, in said State.

Afterwards the case was tried before a jury in the State Circuit Court for said county, who, on April 15, 1885, found a verdict, under the direction of the court, for the defendants, on which there was a judgment for costs in their favor; which judgment was, on January 11, 1886, on writ of error, reversed by the Supreme Court of the State, and a new trial was ordered that resulted, on May 21, 1886, in a verdict for the plaintiff for the sum of $60,000.

On May 18 the death of the defendant, Peter Donahue, was suggested, and his executors, James M. Donahue, Annie Donahue, and Mary Ellen Schroeder substituted as defendants. Afterwards the case was heard on the motion of plaintiff for judgment, and the motions of the defendants for a new trial and a judgment notwithstanding the verdict, and on June the 30th, 1886, the first motion was denied and the latter allowed on the ground that the complaint did not state facts sufficient to constitute a cause of action; and thereupon judgment was entered for costs in favor of the defendants; which judgment was, on October 20th, 1886, on writ of error, reversed by the State Supreme Court, and the case remanded for further proceedings according to law.

On December the 18th, 1886, the State Circuit Court allowed the motion for a new trial and set aside the verdict, from which order the plaintiff appealed to the Supreme Court, which appeal was, on April 18, 1887, dismissed, and thereafter the case was again submitted

to a jury, who, being unable to agree, were on July the 15th, 1887, discharged without finding a verdict.

July 30th, 1887, the defendants, D. V. B. Henarie, Eleanor Martin, and James M. Donahue, Annie Donahue and Mary Ellen Von Schroeder, executors of the last will and testament of Peter Donahue, deceased, applied to the State court for a removal of the cause to the United States Circuit Court, and on the 1st day of August, 1887, the cause was removed into the Circuit Court of the United States for the District of Oregon, by an *order of the judge of the State court* (Record, 78.)

Thus it will be seen that this case was pending in the State courts from the 30th day of November, 1883, until the 1st day of August, 1887, and was tried before a jury three different times in the Circuit Court and three times in the Supreme Court of the State, there being one verdict for defendants, a second verdict for plaintiff for $60,000, and one mistrial.

PETITION FOR REMOVAL.

On the 30th day of July, 1887, the defendants, citizens of the State of California, filed in the *Circuit Court of the State of Oregon* for Multnomah County a petition, of which the following is a copy:

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR MULTNOMAH COUNTY.

J. H. Fisk, Plaintiff,
vs.
D. V. B. Henarie, Peter Donahue, Eleanor Martin, Thos. S. Martin, Edward Martin, and John D. Wilcox, Defendants.

To the Hon. E. D. Shattuck, Judge of the Circuit Court of the State of Oregon for Multnomah County:

Your petitioners, D. V. B. Henarie, Eleanor Martin,

and James M. Donahue, Annie Donahue, and Mary Ellen Von Schroeder, the executors of the last will and testament of Peter Donahue, deceased, respectfully show that they are now and at, and at all times since the commencement of the above-entitled action have been citizens and residents of the State of California, residing in San Francisco, therein, and that the plaintiff, James H. Fisk, is now and at, and at all times since, the commencement of said action has been a citizen and resident of the State of Oregon, residing in Portland therein.

Your petitioner further shows that there is and was at the time said action was commenced a controversy therein between the plaintiff aforesaid and these petitioners as defendants.

That the amount involved in said action is sixty thousand dollars, exclusive of interest and cost.

That said action is brought to recover said sum of sixty thousand dollars from these defendants, plaintiff claiming therein that *on* or about the month of December, 1880, the plaintiff and said D. V. B. Henarie and Eleanor Martin as guardian of James V. Martin, Peter D. Martin, Genevive Martin, Walter S. Martin, and Andrew D. Martin, minors, and Thomas S. Martin, Edward Martin, and John D. Wilcox, trustee, for themselves agreed that if plaintiff would procure a purchaser of 600,000 acres of land they owned in Oregon at $1.00 per acre they would pay him ten per cent. thereof as compensation, and that pursuant to said contract plaintiff procured a purchaser on October 4, 1881, who entered into a written agreement to buy the same, and that thereafter the interest in said lands belonging to said minors was sold and conveyed to the defendant, Peter Donahue, the plaintiff further alleging therein that no payment has been made him on said ten per cent. commission, and sixty thousand dollars is due and owing to him thereon; that defendants have answered denying said or any indebtedness.

And your petitioner shows that said action was commenced on November 13, 1883; that said defendant, Donahue, died in 1885 in the county of San Francisco, State of California, and your petitioners, James M. Donahue, Annie Donahue, and Mary Ellen Von Schroeder, are the duly appointed and acting executors of his last will and testament, which was duly admitted to probate in said county of San Francisco, and they were, on May 16, 1886,

by stipulation of the parties to said action, duly substituted as defendants therein in the place and stead of their testator.

That said action has not been tried and is now pending in the above-entitled court.

That from prejudice and local influence your petitioners will not be able to obtain justice in this court or in any other State court to which the said defendants may under the laws of this State remove said cause.

That the other defendants in said action, Thomas S. Martin, Edward Martin, and John D. Wilcox, now and at all times since the commencement of said action, have been citizens and residents of the State of Oregon, residing in Portland, therein; that your petitioners desire to remove said cause to the Circuit Court of the United States for the district of Oregon under the provisions of the act of Congress approved March 3, 1887.

Your petitioners further say that they have filed the affidavit required by the statute in such cases, and they herewith offer their bond, with surety, in the penal sum of one thousand dollars, conditioned as by the statutes of the United States required.

Your petitioner therefore prays that said bond may be accepted and approved, and that said cause may be removed into the next Circuit Court of the United States for the district of Oregon, and that no further proceedings may be had therein in this court.

And your petitioners will ever pray.

JAMES K. KELLY and
GEARIN & GILBERT,
Attorneys for Petitioners.

STATE OF CALIFORNIA, }
City and County of San Francisco, } *ss:*

I, D. V. B. Henarie, being first duly sworn, say that I am one of the petitioners above named, and that the foregoing petition is true, as I verily believe.

D. V. B. HENARIE.

Subscribed and sworn to before me this 25th day of July, 1877.

[SEAL.] EUGENE W. LEVY,
Commissioner of Deeds for the State of Oregon in California.

(Record, 72–73).

AFFIDAVIT FOR REMOVAL.

Accompanying said petition was an affidavit of which the following is a copy:

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR MULTNOMAH COUNTY.

J. H. FISK, Plaintiff,
vs.
D. V. B. HENARIE, PETER DONAHUE, ELEANOR MARTIN, THOS. S. MARTIN, and JOHN D. WILCOX, Defendants.

STATE OF CALIFORNIA, *City and County of San Francisco.* } *ss:*

I, D. V. B. Henarie, and I, Eleanor Martin, being each duly sworn, each for himself and herself, say that I am one of the defendants in the above-entitled action; that I have reason to believe and do believe and I so state that from prejudice and local influence the defendants in said cause, to-wit, we, the affiants, and James M. Donahue, Annie Donahue, and Mary Ellen Von Schroeder, executors of the last will and testament of Peter Donahue, deceased, will not be able to obtain justice in said State court or in any other State court to which said defendants, under the laws of the State of Oregon, have the right to remove the same on account of such prejudice and local influence.

D. V. B. HENARIE.
ELEANOR MARTIN.

Subscribed by the said D. V. B. Henarie and Eleanor Martin and by them severally sworn to before me this 25th day of July, 1887.

[SEAL.] EUGENE W. LEVY,
Commissioner of Deeds for the State of Oregon in California.

(Record, 74).

This petition and affidavit were filed in the *State Circuit Court* July 30, 1887.

And thereafter and after the filing of a bond the State court, on August 1, 1887, made an order of which the following is a copy:

JAMES. H. FISK, Plaintiff,
vs.
D. V. B. HENARIE, ELEANOR MARTIN, PETER Donahue, Thos. S. Martin, Edward Martin, John D. Wilcox, Defendants. } 4916.

Now come the defendants, D. V. B. Henarie, Eleanor Martin, and Annie Donahue, James M. Donahue, and Mary Ellen Von Schroder, executors of the last will and testament of Peter Donahue, deceased, by their attorneys, James K. Kelly and Gearin and Gilbert, and present to the court their affidavit, petition, and bond for the removal of this cause to the Circuit Court of the United States for the District of Oregon, under the provisions of the Act of Congress approved March 3, 1887.

And it appearing to the court that said affidavit, petition, and bond are made and executed in our form of law according to the provisions of said act of Congress * in relation to the removal of cause from State court to the court of the United States.

And it further appearing that the surety in the said bond is good and sufficient and the same is hereby approved by the court—

It is therefore ordered that the State court proceed no further in this cause, and that this action be removed into the Circuit Court of the United States for the District of Oregon.

(Signed) E. D. SHATTUCK, *Judge.*

(Record, 78).

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* In relation to the removal of causes from State court to the court of the United States.

And on the 30th day of September, 1887, the transcript was filed in the United States Circuit Court (Record, 79), and on the 8th day of October, 1887, a motion to remand, accompanied by a traverse, a positive denial by plaintiff of the existence of any prejudice or local influence was made, of which the following is a copy:

MOTION TO REMAND.

In the United States Circuit Court for the district of Oregon.

JAMES H. FISK, Plaintiff,
vs.
D. V. B. HENARIE *et al.*, Def'ts. } Motion to Remand Cause.

The plaintiff, J. H. Fisk, by his attorneys, moves to remand the above-entitled cause to the Circuit Court of the State of Oregon, from whence it came, on the grounds that this United States Circuit Court has no jurisdiction of the action, neither of the subject-matter of the action nor of the defendants therein, for the reasons following:

1. Because said application for the removal of said cause was not made in time or before trial of said cause in said State court.

2. Because the petition and affidavit for the removal of said cause upon the grounds of local influence or prejudice are insufficient in that they do not set forth the facts or reasons showing said alleged prejudice or local influence.

3. That the rules of practice in said State court provide that copies of all papers filed in any cause pending in said court shall be served upon the adverse party, and that in the absence of such service such papers so filed shall be disregarded; that no service of the said papers for said removal were served upon plaintiff or his counsel, nor does the record show any service thereof.

4. Because said petition and accompanying papers filed for the purpose of removing said cause do not show a proper case for removal.

And plaintiff hereby denies the existence of any prejudice or local influence which would prevent said de-

fendants or any of them from obtaining justice in said State court or at all; and plaintiff hereby applies to this court to examine into the truth of said affidavits alleging said prejudice and local influence and the grounds thereof, and thereupon to direct that said action be remanded to the court whence it was removed. This motion is based upon the record and the affidavits herewith filed in support of this motion.

GEO. H. WILLIAMS,
GEO. H. DURHAM, and
H. Y. THOMPSON,
Of Attorneys for Plaintiff.

STATE OF OREGON, }
County of Multnomah. } *ss:*

Due service of the within motion is hereby accepted, at Portland, Oregon, this 6th day of October, 1887, by receiving a copy thereof, duly certified to as such by Geo. H. Durham, of counsel for plaintiff.

JAS. K. KELLY,
Of Attorneys for Def'ts.

Filed October 8, 1887.

R. H. LAMSON, *Clerk.*

(Record 79–80).

Which motion was, on October 26, 1887, denied by the court, and on December 17, 1887, the cause was tried by a jury, and on that date a verdict rendered for defendants (Record, 81–95).

On December 19, 1887, judgment was entered against the plaintiff and in favor of the defendants for costs and disbursments taxed at $\$604\frac{95}{100}$, and from which final judgment the cause is here on writ of error (Record, 96).

And afterwards, and on the 28th of January, 1888, the plaintiff filed a motion for a new trial, of which the following is a copy:

IN THE UNITED STATES CIRCUIT COURT FOR THE DISTRICT OF OREGON.

J. H. FISK, Plaintiff,
vs.
D. V. B. HENARIE *et al.*

Motion for New Trial.

The plaintiff moves the court to set aside the verdict of the jury heretofore rendered in the above-entitled action and for a new trial herein for the following reasons:

1. The court has no jurisdiction of the parties or of the subject-matter of said action.
2. For error of the court in denying plaintiff's motion to remand the said cause to the Circuit Court of the State from which the same was removed.
3. The error of the court in submitting to the jury the question of whether or not there was a modification of the contract for the payment of commissions, out of which this action arose.

WILLIAMS, DURHAM & THOMPSON,
Plaintiff's Attorneys.

Which motion was, June 11, 1888, denied by the court (Record, 99, 100).

ASSIGNMENT OF ERRORS.

The court below erred in denying the plaintiff's motion (Record, p. 73) to remand this cause to the State court for the following reasons:

1st. Because the application for removal from the State to the Federal Court was not made before trial in the State court, and therefore not in time under the Removal Act of March 3, 1887.

2nd. Because the transcript from the State court did not give the United States Circuit Court jurisdiction of the case or furnish any legal evidence to said court.

3d. Because the application for removal, instead of being made to the Circuit Court of the United States, as required by said act, was made to the State court.

4th. Because the petition and affidavit of defendants (Record, pps. 72, 73, and 74) for removal upon the grounds of prejudice and local influence are insufficient in this, that they do not state positively, but on belief, the existence of such prejudice and local influence as would prevent them from obtaining justice in the State courts; nor do they set forth any facts or reasons showing the existence of the alleged prejudice and local influence, or reasons for the belief of the petitioners in their existence.

5th. Said court erred in refusing to examine into the truth of the petition and affidavit for removal, alleging the existence of prejudice and local influence, and in refusing to allow the plaintiff to make any showing upon the subject as proffered by him—he having in his motion to remand denied in the court below positively the existence of any such prejudice or local influence.

6th. The court erred in holding that sub-section 3 of section 639 of the Revised Statutes was not repealed by the act of March 3, 1887, relating to the removal of causes from State to Federal courts, and in holding that so much of section 639 of the Revised Statutes as relates to the *method of removal* on account of prejudice or local influence and the proof thereof, is not in conflict with the act of 1887, and is, therefore, still in force and applicable to such removal. (Record, 85.)

7th. The court erred in holding, as stated in the opinion (Record, 89) that "this cause was removed under sub-section 3 of section 639 of the Revised Statutes, which section requires the application for removal to be made *before the trial or final hearing of the suit.*"

8th. The court erred in not remanding the cause for the reason that there never had been any adjudication by the said Circuit Court of the United States, or any record thereof made that it had been at any time or in any manner made to appear to said court in such suit that there existed such prejudice or local influence as would prevent defendants from obtaining justice in the State courts, and because there never had been any adjudication or any order of such court or any record thereof directing the removal of said suit to the Circuit Court.

9th. The court erred in holding that it was the intention of Congress, as expressed in the removal act of 1887, to provide for the removal of a "suit" on the application of a defendant or of defendants, citizens of a State other than that of which the plaintiff is a citizen, and where there are one or more defendants citizens of the same State of which the plaintiff is a citizen, and in which suit the interests of the defendants are joint and not separable.

10th. The court erred in holding that Congress has the power, under the Constitution, to provide for the removal of a suit from a State to a national court in which some of the necessary parties defendant are citizens of the same State with the party plaintiff, and in failing to hold that the act of March 3, 1887, in the event it should be held as expressing such power, is unconstitutional.

11th. Said court erred in denying plaintiff's motion for a new trial for reasons stated in the foregoing assignment of errors, and in rendering judgment against the plaintiff in the court below for costs and disbursements.

ARGUMENT.

Point I.

First Assignment of Error.

Our contention in the first place is, and this is our

first assignment of error, that the application for removal was not made in time, as required by the removal act of March 3, 1887, United States Statutes, vol. 24, page 553. Clearly the application is not good upon the ground of diverse citizenship: for section 3 of said act requires a petition for removal upon that ground to be filed in the State court "at the time, or any time before the defendant is required by the laws of the State or the rule of the State court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff." This, of course, can not apply where the pleadings were made up and three jury trials had at as many different terms of the court before the petition for removal was filed.

Is the application good under section 2 of said act, which provides that an application made upon the ground of prejudice or local influence must be made "*at any time before the trial thereof?*" We think it will be admitted, and such have been the repeated rulings of this court, that the primary object of the act of 1887 was to make the limitations upon the jurisdiction of the Federal courts more restrictive than they were before said act was passed.

Sub-section 3 of section 639 of the Revised Statutes was the law in force as to removals from State courts on account of local prejudice when the act of 1887 was passed. Said sub-section required the petition to be filed "at any time before the trial or *final* hearing of the suit." It has been held that the adjective "*final*" in that statute applies as well to the word "trial" as to the word "hearing;" so that under said sub-section a petition for removal was filed in time if filed before the "final" trial or hearing in the State court.

Insurance Co. *v.* Dunn, 19 Wallace, 214;
Hess *v.* Reynolds, 113 U. S., 75.

Now, the word "final" is dropped in section 2 of the act of 1887, and it must be supposed that Congress intended to effect some change in the law by this change of phraseology. According to the decision of the court below, the elimination of the word "final" from said sub-section amounts to nothing. We submit that the substitution of the words "at any time before the trial thereof" for the words "at any time before the trial or *final* hearing" was intended in conformity to the spirit of the whole act, to curtail the jurisdiction of the Federal court by requiring the removal to be made before "*any*" instead of the "*final*" trial.

In the act of 1875, 18 U. S. Statutes, p. 470, the language was, "before or at the term at which said cause could be first tried and *before the trial thereof*."

The facts in the case of Alley *v.* Nott, 111 U. S., 472, made it necessary for this court to define the meaning of the words "*before the trial thereof*" in said act; and it was held that a trial on a demurrer to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action was "the trial," or at least *one* of such trials, contemplated by said act. We think there is no essential difference between the meaning of the words "at any time before the trial thereof," in section 2 of the act of 1887, and the words "and before the trial thereof" in section 3 of the act of 1875.

They mean, it is respectfully submitted, precisely the same thing, and they each mean the *first* trial—whether it be on an issue of law or fact; whereas the meaning of the act of 1866, sub-section 3 of section 639, Rev. Stats.: "At any time before the trial or *final* hearing" meant the *last* or *final* trial.

This ruling in Alley *v.* Nott, *supra*, was cited and affirmed by this court in Scharff *v.* Levy, 112 U. S., 711;

Gregory *v.* Hartley, 113 U. S., 742, and Laidly *v.* Huntington, 121 U. S., 179. See also Wilson *v.* Rock Island Paper Co., 20 Fed. Rep., 705; Lookout Mountain R. Co. *v.* Houston & Co., *et al.*, 32 Fed. Rep., 711; Davis *v.* Chicago & N. W. Ry. Co., 46 Fed. Rep., 307; Boyd *v.* Gill, 21 Blatch., 543; Dillon's Removal of Causes, see 65*b*, 4th ed.; Work's Removal of Causes, 26 and 27.

In Gregory *v.* Hartley, 113 U. S., 744, *supra*, decided October term, 1884, Chief Justice Waite said:

"It is also been decided that there can not be a removal after hearing on a demurrer to a complaint because it does not state facts sufficient to constitute a cause of action. Alley *v.* Nott, 111 U. S., 472; Scharff *v.* Levi, 112 U. S., 711. Either one of these rules," referring for one to the rule that requires the application for removal to be made at the first term at which the cause is in law triable, and to the other which on grounds of local prejudice requires the application to be made before "*the trial*," says the chief justice, "is fatal to the present case. * * The answer and cross-petitions of Hartley, the original answer of Kingley, and the original answer and cross-petition of Parshall, were all demurred to on the 17th day of May, 1880, and the demurrers overruled nearly two years before the petition for removal was filed. After the hearing of the demurrers it was too late, under our decisions, to ask for a removal."

"The act of 1875 required the petition for removal to be filed 'at or before the term at which said cause could be *first* tried, and before the trial thereof.' It might be filed at *any time* during the first trial term, unless there was a trial. In case of trial the application must be made *before trial*."

Tennessee Coal, Lumber, and Car Work Co. *v.* Walker, 37 Fed. Rep., 546. Opinion by Judge Key.

"The act of March 5, 1887, is and was intended to be restrictive in its character. It was designed to control the jurisdiction of the Federal courts and diminish their business."

37 Fed. Rep., 546, *supra*.

The case of Lookout Mountain R. Co. *v.* Houston & Co., *supra*, decided in the Circuit Court of the Eastern District of Tennessee, November 14, 1887, was one wherein the defendant had filed a demurrer in the State court upon various grounds going to the entire bill of complaint, which demurrer was sustained by the State court and the bill dismissed. An appeal had been taken to the Supreme Court of the State, which reversed the decree of the chancellor—being a suit in equity—and sent the cause back to the Chancery Court to be proceeded with, after which the defendant had the cause removed to the Circuit Court. Judge Key, in passing upon a motion to remand, which motion was allowed, said:

"It is most palpable that the cause is not removable under the act of March 3, 1875, the Supreme Court having decided time and again that the hearing of a demurrer is a 'trial' within the meaning of said act. Alley *v.* Nott, 111 U. S., 472; Scharff *v.* Levy, 112 U. S., 711; Gregory *v.* Hartley, 113 U. S., 742; Laidly *v.* Huntington, 121 U. S., 179. Moreover, the application for removal in this cause was filed April 12, 1887, and falls under the provisions of the act of March 3, 1887."

Judge Key, after showing that the removal could not be made on account of diverse citizenship only, from the fact that an application for such purpose under the act of 1887 should have been made at the term at which the cause is returnable instead of at the term at which it is triable, as in the act of 1875, said:

"It remains to determine whether the allegation as to local influence and prejudice brings the cause here. The act of March 2, 1867, provides that for such cause removal may be had on petition filed 'at any time before the trial or final hearing of the suit.' The act of 1887 says that the application for removal may be filed 'at any time *before the trial thereof.*' The words '*or final hearing*' are omitted. The act of 1875, so often construed, says the petition for removal may be filed 'be-

fore or at the term at which said cause could be first tried, and before the trial thereof.' Each act has the words 'before the trial thereof.' The evident intent of Congress in the act of 1887 was to diminish and discourage litigation in and curtail the jurisdiction of the Federal courts, and when it omitted from that act the words '*or final hearing*' it meant to place removals which had been provided for on account of prejudice and local influence in the same category as removals under the act of 1875. If the hearing and determination of a demurrer be a trial in one case, it must be a trial in the other. Such a conclusion seems inevitable."

Judge Dillon, in his treatise on "Removal of Causes," section 65, says:

"The decisions under the acts of 1866 and 1867, that a removal may be applied for after a verdict has been set aside and a new trial granted, or the judgment of the trial court has been wholly reversed and a trial *de novo* awarded, are *wholly inapplicable* under the act of 1875. It is expressly decided that when a cause has been tried in a State court, but that court has granted a new trial, and, before the second trial transpires, the plaintiff takes proceedings to remove the cause into the Federal court, the removal comes too late under the act of 1875 for '*trial*,' as there used means '*first* trial.'"

Newdecker *v.* Rosembaum, 19 Blatch., 35;
Holland *v.* Chambers, 110 U. S., 59;
Young *v.* Andes Ins. Co., 3 Cent. L. J., 719.

"And, after trial of a cause in the State court, reversal of the judgment by the State appellate court, and remand of the same to the trial court for re-trial, it is too late to remove on the ground of a separable controversy."

Core *v.* Vinal, 117 U. S., 347;
Dillon's Removal of Causes, 4 ed., sec. 65*a*.

In Laidly *v.* Huntington, 121 U. S., decided at the October term, 1886, Mr. Chief Justice Waite, in delivering the opinion of the Court, said:

"The petition to remove was filed too late, for it was after the case had been heard on demurrer to the bill because it did not state facts sufficient to entitle the complainant to the relief prayed for, and the demurrer is sustained."

Alley *v.* Nott, 111 U. S., 472.

Thus it will be seen that this court so late as the October term, 1886, reaffirmed the decision in the case of Alley *v.* Nott, 111 U. S., 472, although the learned judge who decided the case at bar in the court below insisted very strenuously in his opinion (Record, 91, 92), that the doctrine upon this point enunciated in the case of Alley *v.* Nott, 111 U. S., *supra*, was flatly overruled by this court in the case of Baltimore & Ohio Railway *v.* Bates, 119 U. S., 464, even going to the extent of stating in his opinion (Record, 92), the following:

"The suggestion of the learned chief justice to the contrary in Alley *v.* Nott, *supra*, on which the plaintiff seems to rely, must yield to this direct decision of the court announced by himself."

The error of the court below arises from the fact that he failed to notice that the decision in the case of Alley *v.* Nott, *supra*, as also the decision the case of Laidly *v.* Huntington, *supra*, were each cases wherein removal was had under the act of March 3, 1875; whereas in the case of Baltimore & Ohio Railway *v.* Bates, *supra*, the removal was under subsection 3 of section 639 of the Revised Statutes. These facts being observed, it is perfectly apparent that there is no confiict whatever on this subject between any two of the three opinions of this court just quoted.

Point II.

Seventh Assignment of Error.

Presumably Congress intended to re-enact the said provision in the act of 1875 by the act of 1887. The

learned judge in the court below refers to Baltimore and Ohio R. R. Co. *v.* Bates, 119 U. S., 464, as overruling Alley *v.* Nott; but this is clearly an error, for the application for removal in the latter case was made under sub-section 3 of section 639 Revised Statutes, which allows an application to be made before a "*final*" trial instead of before "*the trial*" of a cause in the State court. We think the fatal mistake made by the learned judge below was in holding that the application for removal in this case was made under sub-section 3 of section 639, Rev. Stat. Judge Deady, in his opinion, says:

"This cause was removed under sub-section 3 of section 639 which requires the application to be made 'before the trial or final hearing of the suit.'" (Record, p. 89).

This was a grave mistake upon the part of the court below, and one made perfectly apparent by the following statement:

The act of 1887 was passed and became a law March 3, 1887, and the application for removal in this case was made in the State court July 30, 1887. The learned judge below says further in his opinion in this case (Record, p. 84), that section 2 of the act of 1887 (which provides for removals for local prejudice) contains sub-section 3 of said section 639 in a modified form and so far repeals the latter by implication. This is undoubtedly correct and therefore it would seem to be very clear that the application for removal in this case was not and could not be made under said sub-section.

The application for removal in this case was made under section 2 of the act of 1887 and *not* under sub-section 3 of section 639 Rev. Stat., and the petition and order of the State court for removal so recite. That the court may have the petition for removal and affidavits on which it was based directly before it, they are presented in full in this brief, pages 3 and 6; see also Record, 72–73.

For order of Hon. E. D. Shattuck, Judge of the State Circuit Court, purporting to remove case to the U. S. Circuit Court, see page 7, brief; also Record, 78.

Thus it will be seen that both petition for removal and the order of the State court recite that the removal proceedings were had under the act of 1887 and not under the act of 1866, or the sub-section of section 639, as stated by the court below.

This question was very carefully considered and ably presented by Judge Shiras in the case of Davis *v.* Chicago and N. W. Ry. Co., decided by him in the Circuit Court for the northern district of Iowa, June 10 last. This cause was commenced in the district court of Wright County, Iowa, and was removed to the Circuit Court upon the petition of the defendant who alleged the existence of local prejudice and influence. The transcript having been filed in the Circuit Court, the plaintiff moved for an order remanding the cause, for the reason, among others, that it appeared on the face of the record that the petition for removal on the ground of local prejudice was not filed until after the cause had been once tried in the State court. The record showed that on the 25th day of March, 1889, the case came on for trial before a jury in the State court. Evidence was introduced and the case submitted to the jury on the 28th, and on the 29th, the jury being unable to agree, were discharged from the further consideration of the cause and the same was continued to the May term and thence to the October term of said court—the petition for removal into the Federal court having been filed on the 10th of September, 1889. Judge Shiras, after reciting these facts, said:

"Thus the question is presented whether under the act of 1887, as amended by that of 1888, the cause can be removed on the ground of local prejudice or influence

after a trial has been entered upon in the State court, but which for any reason did not become a *final trial*, so that the cause was pending for trial when the petition for removal was filed in the proper court. The decisions in the several circuits are not in accord upon this question, and it can not be questioned that a strong argument can be made in support of either side of the proposition. The act of 1866 provided that the petition for removal might be filed 'at any time before the trial or final hearing of the suit.' The act of 1867 provided that the petition might be filed 'at any time before the final hearing or trial of the suit.' In cases arising under these statutes it has been held that the word 'final' qualified both 'hearing' and 'trial,' and that, therefore, if a case was pending awaiting a trial it could be removed, regardless of the number of previous trials or mistrials that might have taken place. These decisions of the Supreme Court are based upon the force given to the word 'final' as qualifying the words 'trial,' as applicable to law actions, and 'hearing,' as applicable to suits in equity. (Insurance Co. *v.* Dunn, 19 Wall., 214; Vannevar *v.* Bryant, 21 Wall., 41. In the act of 1875 the language used is that petition for removal must be filed 'before or at the term at which the said cause could first be tried, *and before the trial thereof*.'

"In construing this act it has been repeatedly held by the Supreme Court that the submission of a demurrer presenting an issue of law affecting the merits is a trial within the meaning of the act, and that even though, after the rule upon the demurrer, leave is granted or the right exists by the statute to amend, and the case is pending for final trial upon such amendment, the right of removal does not exist, because not applied for before the trial. (Alley *v.* Nott, 411 U. S., 472; Scharff *v.* Levy, 112 U. S., 711; Gregory *v.* Hartley, 113 U. S., 742.) When, therefore, the act of 1887 was enacted it had been settled by repeated decisions of the Supreme Court that when the statute regulating removals used the term 'before trial or hearing,' or the equivalent thereof, it meant that the removal might be had at any time when the cause was pending in the trial court awaiting trial, regardless of the number of previous trials or mistrials that had been had, for the reason that none of these could be

deemed to be the final trial or hearing; but if the language used in the statute was the equivalent of that found in the act of 1875, to wit, 'before trial thereof,' then the meaning was that the removal must be petitioned for before the judgment of the State court had been invoked upon any question of law or fact affecting the merits of the case, as upon a demurrer to the petition or plea, although such demurrer or plea might have been overruled, and the cause be pending for trial and final disposition. In the light of the interpretation given to these phrases, Congress enacted in the act of 1887 and the amendatory act of 1888, that, on the ground of local prejudice or influence, a cause may be removed by the defendant, 'at any time before the trial thereof.' It is a settled principle that when, through judicial interpretation, certain words have acquired a well-understood meaning, and on their use in a subsequent statute touching the same subject, the presumption is that the legislature intended them in the sense already given them by previous interpretation. (The Abbotsford, 98 U. S., 440; Claflin *v.* Insurance Co., 110 U. S., 81.) Is it not, therefore, the fair inference that when Congress, in adopting the act of 1887, changed the phraseology from that used in the act of 1867 to that used in the act of 1875, it was intended that the words 'before the trial thereof,' found in the act of 1887, should bear the same construction that had been given them in the act of 1875?"

"This, it seems to me, is the fair inference from the change made in the words used; and while it can not be denied that there is much force in the reasoning found in the cases which held the contrary view, yet, on the whole, to my mind the weight of the argument is that the cases that hold that, under the present statute, a removal on the ground of local prejudice or influence can not be had after a trial has once been had in the State court, or, in other words, that in this particular the present statute must bear the same construction as that of 1875, and hence, that after a trial upon the merits has been actually entered upon in the State court, it is too late to seek removal to the Federal court upon the ground of local prejudice or influence. The motion to remand is therefore sustained at the cost of the defendant."

Chief Justice Waite, in the case of Alley *v.* Nott, *supra*, in showing why a party should not be allowed to try his case in the State court before he applies for removal, says:

"To allow a removal after such trial would be to permit a party to experiment on his case in the State court, and, if he met with unexpected difficulties, stop the proceedings and take the suit to another tribunal."

The defendants in this case, after experimenting for over four years in the State courts, are allowed by the court below to renew their experiments in the Federal courts.

But, again, if the court below were correct in holding, as he did (see opinion, Record, 89), that "this cause was removed under sub-section 3 of section 639 of Revised Statutes, which requires," etc., then clearly, inasmuch as the record in this case shows that *three* of the defendants are and were at the commencement of the suit citizens of the same State of the plaintiff, such removal could not properly be made, for this court has decided that—

"A suit can not be removed from a State court to a Circuit Court of the United States on the ground of prejudice or local influence under sub-section 3 of section 639, Revised Statutes, unless all the plaintiffs or all the defendants are citizens of the State in which the suit is brought and of a State other than that of which those petitioning for the removal are citizens."

Hancock *v.* Holbrook, 119 U. S., 586.

For the convenience of the court, we present below the phraseology of the different removal acts bearing upon the question *as to the time* when the application to remove must be made:

1st. The judiciary act of 1789 provides that the party entitled to remove the cause should file his petition for such removal "*at the time of entering his appearance* in such court."

2d. The act of July 27, 1866, provides as follows:

"* * * The defendant, who is a citizen of a State other than that in which the suit is brought, may at *any time before the trial or final hearing of the cause* file a petition for removal of the cause," etc.

3d. The act of March 2, 1867, provides—

"* * * may at *any time before the final hearing or trial of the suit*, file a petition in such court for the removal of the suit," etc.

4th. Sub-section 3, section 639 Revised Statutes, which provided specially for removals on account of local prejudice, adopted the precise phraseology of the act of July 27, 1866, namely: "*At any time before the trial or final hearing of the cause.*"

5th. The act of March 3, 1875, provides in the case of diverse citizenship, as this act says nothing about prejudice or local influence, that the party desiring to remove the cause to a Federal court should make and file his petition in such suit in the State court "before or at the term at which said cause could be first tried *and before the trial thereof.*"

This act, as this court has held repeatedly, repealed the first and second sub-sections of section 639 of the Revised Statutes, such first sub-section being a re-enactment of the judiciary act of 1789; and the second sub-section that of the act of July 27, 1866; but left unrepealed that portion of the act of 1867 contained in sub-section 3 of section 639 of the Revised Statutes which related to the removal of a cause on the ground of prejudice or local influence.

Hess *v.* Reynolds, 113 U. S., 73;
Ayres *v.* Watson, 113 U. S., 594;
Baltimore and Ohio R. R. Co. *v.* Bates, 119 U. S., 465;
Speer on Removal of Causes, sec. 16, p. 20.

6th. The act of March 3, 1887, and also as amended by the act of August 13, 1888, provides that in the case of a removal on the sole ground of diverse citizenship, the party desiring to remove shall "make and file a petition in such suit in such State court *at the time, or any time before the defendant is required by the laws of the State or the rule of the State court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff;*" while in the case of a removal on the ground of prejudice or local influence, this act provides that "any defendant, being such citizen of another State, may remove such suit into the Circuit Court of the United States for the proper district at *any time before the trial thereof*, when it shall be made to appear to *said Circuit Court* that from prejudice or local influence he will not be able to obtain justice in such State court, or in any other State court to which the said defendant may under the laws of the State, have the right on account of such prejudice or local influence to remove said cause." This act clearly repeals sub-section 3 of section 639 of Revised Statutes.

Point III.

Second and Third Assignments of Error.

We contend in the second place, and this point includes our second and third assignments of error, that it was not made to appear to the court below in any legal way that the defendants from prejudice or local influence were not able to obtain justice in the State court of Multnomah County, or any other State court to which the defendants, under the laws of the State, had the right, on account of such prejudice or local influence, to remove said cause. Section 2 of the act of 1887 is as follows:

"And where a suit is now pending, or may be hereafter brought in any State court, in which there is a controversy between a citizen of the State in which the suit

is brought and a citizen of another State, any defendant being such citizen of another State, may remove such suit into the Circuit Court of the United States for the proper district, at any time before the trial thereof, when it shall be made to appear to said Circuit Court that from prejudice or local influence he will not be able to obtain justice in such State court, or in any other State court to which the said defendant may, under the laws of the State, have the right, on account of such prejudice or local influence, to remove said cause: *Provided*, That if it further appear that said suit can be fully and justly determined as to the other defendants, in the State court, without being affected by such prejudice or local influence, and that no party to the suit will be prejudiced by a separation of the parties, said Circuit Court may direct the suit to be remanded, so far as relates to such other defendants, to the State court, to be proceeded with therein."

There was no application made to the Circuit Court of the United States at all, as the statute requires. The application was made to the *State court* without authority of law. The proper procedure, as we understand the above section, was for the defendants to make their showing in the *Federal court*, and upon that showing, if satisfactory, obtain an order upon the State court to send up a transcript of the record. Said section says nothing about filing a petition or affidavits in the *State court*, and the whole proceeding there was irregular, illegal, and void. The court below had no right to treat the transcript from the State court in this case as of any force or validity. It was there without any warrant of law. It did not give the court any jurisdiction. The suggestion in the court below that the method of removal prescribed by said section 639 Revised Statutes is still in force, appears to be untenable. If the court intended to say that a petition and affidavit of the defendant as to his belief in the local prejudice were sufficient, still it is evident that such petition and affidavit must be filed in the Fed-

eral and not in the State court. Under said section 639 the adjudication as to the local prejudice must be made by the State court, but under this act of 1887 it is to be made by the Federal court. Moreover, under said section 639, it was enough for the defendant to make and file an affidavit in the State court that he has reason to believe, and does believe, that he could not obtain justice on account of local prejudice in the court where the suit was then pending; but under the act of 1887 it is necessary for him to "*make it appear*" to the *Circuit Court* that he could not obtain justice "in the State court in which the case was pending, or in any other court of the State to which the suit could be removed under the State laws." The latter clause of section 2 of the act of 1887 evidences the intention of Congress to cut down the jurisdiction of the Federal court as to removals from State courts.

Birdseye *v.* Shaeffer, 37 Fed. Rep., 829.

Point IV.

Fourth, Fifth, and Sixth Assignments of Error.

We contend, in the third place, that the petition and affidavit in this case, if otherwise regular, did not "*make it appear to the court below*," in any legal sense, that the defendants could not obtain justice in the State courts on account of local prejudice, and further that the court erred in declining to permit plaintiff to oppose, by affidavits, the charge of prejudice and local influence, and in refusing to examine into the truth of the petition and affidavit for removal. And this includes our fourth, fifth, and sixth assignments of errors.

Several and conflicting decisions have been made upon this point in the Circuit Court of the United States, two of which affirming the correctness of our position were made by present justices of this court.

Mr. Justice Brewer, in the case of Short *v.* Chicago, M. & St. P. Ry. Co., 34 Fed. Rep., 225, in construing the act of March 3, 1887, takes direct issue upon several material points with Judge Deady in the case of Fisk *v.* Henarie, the case now under consideration. This case is reported in 32 Fed. Reporter, 417. After disposing of a question not in this case, Justice Brewer said:

"The other question is this: An affidavit is filed for removal, in which the affiant states that he has reason to believe, and does believe, that by reason of prejudice and local influence he will not be able to obtain justice in that forum. In other words, an affidavit is made by the proper officers of the corporation in the form prescribed by the act of 1867."

Which act, so far as it relates to the question being discussed, is quoted by the justice, who, proceeding, says:

"By that act the removal was granted upon the filing of the affidavit if in the form prescribed. The removal was absolute, and the actual existence of prejudice or local influence was not a matter for inquiry. In other words, Congress cast the burden upon the conscience of the party, and said that if he was willing to make affidavit that he believed and had reason to believe that from prejudice or local influence he could not obtain justice in the State court, then he should have a removal to the Federal court. Nowhere was it left to be determined as to whether or not such prejudice or influence did exist. But whenever any party litigant in the State court, with the proper citizenship existing, felt that he could not obtain justice in the State court, and was willing to express that fact in an affidavit, the right of removal went beyond the right of challenge. The act of 1887 is a complete reversal of that theory. I am aware that Judge Deady, of Oregon, in the case of Fisk *v.* Henarie, 32 Fed. Rep., 417, has held that this portion of the act with respect to the filing of the affidavit is still in force, but I think he is mistaken. The thought which underlies the matter of prejudice and local influence to-

day, and that underlying the act of 1867, are entirely different. While this act of 1867 is not in terms repealed, yet it is familiar law that when a later act covers the same ground, and is obviously intended by the legislature to be its expressed will upon the whole subject-matter involved therein, then, although there may be no terms of repeal, and although there may be some provisions in the earlier not absolutely inconsistent with those of the later act, yet the whole of the earlier act is repealed. To my mind it is obvious that the legislation of 1887, with respect to prejudice and local influence, was intended to supersede entirely the act of 1867 and to plant the matter upon a new basis, and, planting it upon a new basis, to let the act of 1887 take the place of that of 1867. Let us see what the act of 1887 says upon the subject:

"'Where a suit is now pending, or may be hereafter brought in any State court, in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State, any defendant, being such citizen of another State, may remove such suit into the Circuit Court of the United States for the proper district at any time before the trial thereof, when it shall be made to appear to said Circuit Court that from prejudice or local influence he will not be able to obtain justice in such State court.'

"In other words, before a removal can be had on the ground of prejudice or local influence there must be shown to the Circuit Court of the United States the existence of such prejudice or local influence. It is not given to the party upon his conscience to say he believes, or has reason to believe, that such prejudice exists, and thereby become entitled to a removal; but there is a question of fact which the Circuit Court must determine, and it can not order the removal until it appears that such prejudice or local influence exists. Now, how can that fact be made to appear? How can any fact be made to appear, either by oral testimony or affidavits? The affidavits in this case do not allege the fact. Counsel for plaintiff insists that an affidavit in form simply saying that there does exist prejudice or local influence so as to prevent a fair trial, is not sufficient; that that is a fact which can not be testified to in a general way; that

the affidavits must show a series of isolated and separate facts from which, taken together, the court can see that such local prejudice does exist. Upon that proposition I am inclined to hold against him so far as the first showing is made. It is not, however, necessary to positively decide that question now. If the question were presented I should be inclined to hold that an affidavit alleging in plain and unequivocal terms that such local prejudice does exist, and that a fair trial can not be had, would entitle the party to a removal. I think, however, that that fact, like any other fact, *may be challenged*. After the affidavit has been presented and a removal ordered the party opposing it *may come in and traverse that allegation of prejudice* the same as any other averment of fact; and *this need not be done by a plea of abatement*. No particular form of procedure is prescribed. The rule has obtained, as is proper, that where a petition for removal is filed on the ground of citizenship the truth of its allegations should be challenged by a plea in abatement. But under the local prejudice clause no petition need be filed; all that is required is that it shall be made to appear to the Circuit Court that from prejudice or local influence the party will not be able to obtain justice in such State court; and this showing may be made by affidavit; and if this contains a specific averment, while it may not be conclusive, it is *prima facie* evidence of the fact, and throws the case into this court, leaving the other party to challenge its truth. There being no form, no procedure, prescribed, I think the court, in any particular case, may prescribe a mode of procedure, or might lay down a general rule applicable to all cases. Such being the conclusion to which I have come, both from the argument here and those had elsewhere, it must be held that this affidavit is insufficient. *It is no affidavit at all*. It is a form of affidavit that might be used for the verification of a pleading or other purposes when authorized by statute, *but as evidence it is nothing*. I shall have to sustain the motion to remand on the ground that there is no evidence before me from which to find the existence of any prejudice or local influence."

Mr. Justice Harlan, in the case of Malone *v.* Rich-

mond and D. R. Co., 35 Fed. Rep., 625, in giving construction to the act of 1887, says:

"The present application must be denied upon the further ground that it has not been 'made to appear' to this court that the defendant will be unable to obtain justice in the State court. The act of 1887 makes a radical change in the previous law regulating the removal of causes from the State courts upon the ground of prejudice or local influence. Under the act of 1867, the provisions of which were preserved in the Revised Statutes, section 639, when the citizen of another State, whether plaintiff or defendant in a suit in a State court involving $500, exclusive of costs—the other party being a citizen of the State in which the suit was brought—filed in that court an affidavit stating that he had reason to believe, and did believe, that on account of prejudice or local influence he could not obtain justice in such a court, and offered good and sufficient surety to do certain specified things, the jurisdiction of the State court to proceed further in the suit immediately ceased; and upon the suit being formally entered in the Circuit Court of the United States, it became the duty of the latter court to proceed as if it had been brought therein by original process. Whether prejudice or local influence, preventing justice being done, really existed was not left open, by the act of 1867 or by the Revised Statutes, for investigation by the Circuit Court. In other words, the statute in force prior to the act of 1887 made the removal in cases of that character depend upon the filing of the necessary affidavit in the State court, and the giving there of the required bond. But under the act of 1887 neither affidavit nor petition is required to be filed in the State court, but it is to be 'made to appear' to the Circuit Court, into which it is sought to remove the case, that, from prejudice or local influence, the defendant asking the removal will not be able to obtain justice in the State court. The statute does not prescribe how such fact is to be established; nevertheless, it is to be 'made to appear' in some proper form to the Circuit Court. I think it competent for the Circuit Court to *receive evidence upon the point by affidavits, or by depositions, or by means of an oral examination of witnesses in its pres-*

ence. If the mere *ex parte* affidavit of an officer of a corporation, stating generally that from prejudice or local influence it can not obtain justice in the State court, but not setting forth any facts of a definite character, is held to establish the right of removal, it is easy to perceive that the requirement that the existence of such prejudice or local influence shall be made to appear to the Circuit Court would be practically nullified. It seems to me that those words import a duty upon the part of the Circuit Court to investigate or examine the facts upon which an alleged inability to obtain justice in the State court must rest. And although such investigation or examination is not required by any express words of the statute, to be had upon notice to the party against whom the removal is asked, such notice will best accomplish the object which Congress had in view. This interpretation is sustained by the clause in the second section, referring to cases pending in the Circuit Court at the same time the act of 1887 was passed, or which were, after that date, entered therein, and were removed upon the plaintiff's affidavit as to prejudice or local influence. That clause makes it the duty of the Circuit Court, on application of the other party, to 'examine into the truth of said affidavit and the grounds thereof,' and to remand the case to the State court, 'unless it shall appear to the satisfaction of said court that said party will not be able to obtain justice in such State court.' It can hardly be supposed that the court in such cases must examine into the grounds of removal, and be satisfied that they really existed, while in cases sought to be removed by a defendant, after the passage of the act of 1887, its duty would be performed by ordering a removal, with no other basis for its action than an *ex parte* affidavit of prejudice or local influence made by a defendant, if a natural person, or by one of its officers, if a corporation. I am of opinion that Congress did not intend to invest the circuit courts of the United States with authority to take cognizance of a case pending in a State court upon the ground of prejudice or local influence against the defendant, a citizen of another State, unless the Circuit Court, in some proper way, found, as a fact, that such prejudice or local influence existed. And the simple affidavit by an officer of a defendant corporation, stating in general terms that it

can not, from prejudice or local influence, obtain justice in the State courts—no opportunity having been given to the plaintiff, by notice, to controvert such statement—ought not to be accepted as sufficient evidence of that fact."

This court refers approvingly to this opinion of Mr. Justice Harlan *in re* Pennsylvania Co., 137 U. S., 456, a case to which attention will be attracted later in this brief in these words:

"On this point the Circuit Judge refers to an opinion of Mr. Justice Harlan in the case of Malone *v.* Richmond and Danville Railroad (35 Fed. Rep., 625), which seems to us to express the correct view of the court. It is true other judges have taken a different view, but on a careful consideration of the subject we have come to the conclusion above expressed."

In County Court *v.* Baltimore and Ohio R. R. Co. (35 Fed. Rep., 166), Judge Jackson on a motion to remand the cause in the Circuit Court for the District of West Virginia, decision rendered June 16, 1888, said:

"The plaintiff assigned as another ground why the court should remove this cause that it was also removed under the fourth clause of the second section of the act of 1887 on the ground of local influence. Under this act this question is to be determined solely by the Circuit Court of the United States. The plaintiffs have tendered a plea in writing which alleges 'that it is not true that the Baltimore and Ohio Company has reason to believe and does believe that from prejudice and local influence it will not be able to obtain justice in the Circuit Court of Taylor County or in any other State court.' This plea is manifestly insufficient on its face. It alleges no fact, but merely the denial of the existence of such belief in the petitioning defendant, the Baltimore and Ohio Company, that it could not get justice on account of prejudice and local influence. The act of Congress says 'that a removal shall take place when it is made to appear to the Circuit Court that from prejudice or local influence it will not be able to obtain justice.' It is clear this must appear from

evidence and not from belief. If the plaintiffs desire to raise an issue of this character, as to the existence of prejudice or local influence, the plea should affirm that no such local prejudice or influence exists that would prevent the defendant from obtaining justice in the State courts. But it does not so affirm. It makes no issue contemplated by the statute, and for this reason the motion of the defendant, the Baltimore and Ohio Company, to strike the plea from the record in this case is sustained."

In the case of Niblack *et al. v.* Alexander *et al.*, decided by Judge Woods in the Circuit Court of the United States for the district of Indiana, December 10, 1890, the learned judge followed the decision of Justic Harlan, as declared in Malone *v.* Railroad Co., 35 Fed. Rep., 625, supplementing it with the following remarks:

"The affidavit in support of the petition for removal in this cause was made by the petitioner's attorney, and is in the general terms of the statute, except that it contains the statement 'that affiant knows the facts of such prejudice and local influence, and makes this affidavit from such knowledge.' But this necessarily is only an expression of opinion and without a statement of facts to justify it; means no more than if the affidavit had conformed to the language of the act of March 3, 1875, 'that he has reason to believe and does believe,' etc. The present act says, 'when it shall be made to appear to said Circuit Court,' etc., and the change of phraseology seems to me to require the interpretation which Justice Harlan has adopted. In Rike *v.* Floyd, 42 Fed. Rep., 247, an affidavit was held insufficient on grounds quite applicable here. See also recent decision of the Supreme Court in *ex parte* Pennsylvania Co., 10 S. C. Rep., 141, decided December 22, 1890."

Judge Bunn, in Southworth *v.* Reid, 36 Fed. Rep., 451, decides in conformity to our views, showing where a petition and affidavit should be filed and what they should contain. In that case, like in the case under consideration, a removal was had after the passage of

the act of 1887, but the application was made according to the provisions of the removal act of 1867, as though that act were still in force.

Judge Bunn, in passing upon the motion to remand, says:

"The remaining question is whether the petition makes a proper case for removal under the local prejudice act as it now stands, and I am of the opinion that it does not. The application was made after the act of March 3, 1887, had gone into effect, but the petition is framed according to the provisions of the removal act of 1867, continued in section 639, Rev. Stats., and as though that statute were still in force and unchanged. But it seems inevitable that the provisions of section 2 of the act of 1887, being wholly inconsistent with those of the old act, repealed them. By the former act, in reference to a suit between the citizen of a State in which it is brought and the citizen of another State, it may be so removed on the petition of the latter, whether he be plaintiff or defendant, filed at any time before the trial or final hearing of the suit, if before or at the time of filing said petition he makes and files in said State court an affidavit stating that he has good reason to believe and does believe that from prejudice or local influence he will not be able to obtain justice in said State court."

Judge Bunn then quotes section 2 of the act of 1887 as corrected by the act of August 13, 1888, and says:

"It will be seen that this provision is quite different from the former provision in its scope and meaning in that it limits and restricts the right of removal in at least two essential ways, besides providing in effect that the application shall be made to the Circuit Court of the United States instead of the State court where the action is pending. Under the old act plaintiff or defendant might remove the case, while under the present law the right is restricted to the defendant. Again, under the act of 1867, all that was essential to deprive the State court of jurisdiction and confer jurisdiction on the Circuit Court was for the applicant to file the necessary bond and to make an affidavit stating that he has

good reason to believe and does believe that, from prejudice or local influence, he will not be able to obtain justice in said State court. When an application was made, accompanied by such an affidavit and bond, the jurisdiction of the State court ceased without even an order of removal being made. It was not essential that the fact of prejudice be made to appear, or that any evidence whatever should be adduced. It was enough to allege the belief of the applicant. The court had no inquiry and no finding to make, and no conclusion to come to. Now, looking at the act of 1887, if this radical change in the language means anything, it must mean that the fact of the existence of local prejudice or influence must be made to appear to the Circuit Court. And how can the fact appear to the court except by legal evidence submitted either by the examination of witnesses or by affidavits? The case to be made is wholly different from that under the former law. Then it was not essential that any proof should be submitted, the fact itself not being essential. It was enough that the party could swear that he believed, which has never been taken as legal proof of a fact. In Wisconsin, where the provision is so ample for the removal of a cause from one State court to another, on account of prejudice, it should rarely happen that the party could make it appear to this court that he could not 'obtain justice either in the court where the action is pending or in some other court where it might be removed under the laws of the State.' * * * Now, in order to remove a case into this court under the present strict though just law, it must be made to appear to the court that from prejudice or local influence the party will not be able to obtain justice in the State court where the action is pending, nor in any other State court to which the defendant may, under the laws of the State, have the right to remove the same. I apprehend that in this State it would rarely happen that a proper case for removal could be made under the law."

Judge Bunn, remarking further in this case, says:

"In the action at bar, no case is made. There is, indeed, little attempt to comply with the present statute for removal. On the contrary, the application for re-

moval seems to have been made on the assumption that the act of 1867 is still in full force, unrepealed and unmodified by the act of 1887. The application is made to the State court. The affidavit is made by defendant, Reid, who swears that he believes, and has good reason to believe, and that each of his co-defendants believes, and has good reason to believe, that, from prejudice and local influence, he and his said co-defendants, Murdock and Fisher, will not be able, nor will any of them be able, to obtain justice in the Circuit Court of Wisconsin, for La Crosse County, in which the action is pending, or in any court in the State of Wisconsin to which he and his said co-defendants might, under the laws of the State, remove the action. * * * The adjudged cases under the act of 1887 are somewhat conflicting, but this is the only view I am able to reconcile with the language of the statute. * * * It is contended by the defendants that the defect, if any, in the petition and affidavit, have been waived by the plaintiffs, continuing the case one term in this court. But I think the question is more jurisdictional. No case for removal has been shown to exist, and the court can not take jurisdiction by consent of parties. The action is remanded."

This, it is respectfully submitted, is the precise state of facts in reference to the case now before this court.

Judge Wallace, in the case of Dennison *v.* Brown, 38 Fed. Rep., 535, decided April 18, 1889, and in the case of Amy *v.* Manning, 38 Fed. Rep., 868, affirms in strong language the doctrine upon this subject as laid down by Justices Harlan and Brewer in the cases, *supra*. In the case of Amy *v.* Manning, *supra*. Judge Wallace, in holding on a motion to remand that the court was not concluded by the averment in the affidavit, "that from prejudice or local influence he will not be able to obtain justice in such State court," nor by the other fact that the sufficiency of such affidavit having been passed upon by the Circuit Court when the petition was allowed, that such action was final and could not be reconsidered upon a motion by the plaintiff to remand the suit, said:

"The act of March 3, 1887, has materially changed the provisions of section 639 of the Revised Statutes, so that the condition of removal is no longer the filing an affidavit stating that the removing party 'has reason to believe, and does believe,' that from prejudice or local influence he will not be able to obtain justice in the State court, but the existence of such prejudice or local influence must now 'be made to appear' to said Circuit Court, under section 639. Either the plaintiff or defendant, who was willing to make an affidavit of his personal belief upon a matter of opinion, could remove the cause; consequently it was quite immaterial whether his belief was well founded or not. And therefore he was not required to set forth the grounds of his belief, or the facts or reasons for it, and the adverse party could not controvert the truth of the statement. This was a very different condition from the one in the act of 1887, which allows a removal to a defendant only, when it is made to appear to the court that the requisite state of facts exist. The language of the present act in substance requires satisfactory proof to be made of the existence of hostile prejudice or influence. Opinions of parties or witnesses are not satisfactory, or even competent evidence when addressed to facts which are not peculiarly within the province of experts. Consequently, an affidavit containing mere opinion, even though in the form of a positive statement, is not sufficient; but the facts and circumstances which justify the judicial conclusion that the requisite case exists, must be set forth. The present act substitutes the judgment of the court for the judgment of the removing party, and makes that a traversable issue which before was left wholly to the conscience of the affiant. This is not an issue to be tried on a plea to the jurisdiction. It is to be determined by the court, and, primarily, when the petition and affidavit for removal are presented. It may be reconsidered upon a motion to remand, and, if such a motion is made, and the court is satisfied by further argument or controverting affidavits that the petition ought not to have been allowed, it has the same power to vacate the allowance that it has to vacate any interlocutory order made *ex parte* which has been improvidently or improperly granted. The decisions in the fifth, sixth, and ninth

circuits to the effect that the defendant is not required to state the facts and circumstances that make the existence of prejudice or local influence appear, and sufficiently complies with the terms of the act by stating his own conclusions in the words of the statute, have not been overlooked. These decisions, however, are opposed to others made in the seventh and eighth circuits and to my own decision in March, 1888, in the case of Dennison *v.* Brown, *ante*, 535, where all the questions now involved were considered and were ruled against the contention of the defendant. In the present case an application was made to Judge Lacombe for allowance of the petition for removal, and he decided that an affidavit of the defendant, merely following the language of the statute, without giving any facts or circumstances to show the existence of prejudice or local influence, was insufficient. The conclusion is reached that the affidavit must set forth the necessary facts and circumstances to satisfy the court of the existence of such prejudice or local influence in the State courts as will preclude a removing party from obtaining justice there; that the removing party can not conclude his adversary by his statements in this regard, and that the court has the power to remand the suit, and that it is its duty to do so when satisfied by opposing affidavits that the case made for the defendant is not an honest one. The motion to remand is granted."

In the case of Minnick *v.* Union Insurance Co., decided in the Circuit Court of the United States for the western district of Michigan, November 26, 1889, 40 Fed. Rep., 369, and which cause had been transferred from the State court upon the ground of prejudice and local influence, Judge Severns, in passing upon a motion to remand, said:

"The order for removal was made by me upon the supposed authority of Whelan *v.* Railroad Co., 35 Fed. Rep., 849. A motion to remand to the State court is now made by the attorneys for the plaintiff upon several grounds, the most important of which are—

party as sufficient ground for removal, by an express declaration to that effect, as was done in the former law. But, without such declaration, it appears to me that the fact must be shown by legal evidence, and that if, as the circuit judge holds, it may be shown by a direct and positive averment of its existence, it is the least that could be regarded as sufficient. If the allegation is not controvertible, it makes it all the more necessary to attend to the argument from inconvenience in allowing such great facility in bringing cases into the Federal courts under this clause of the statute. This argument from inconvenience could not prevail against plain language; but when the statute is opened to construction, it is of considerable weight. (Broom Leg. Max., 184.) Thus, a more careful and mature consideration of the subject leads me to think, contrary to what seemed necessary when the order for removal was made, that the existence of prejudice and local influence was not made to appear by evidence competent to prove the fact, and that, therefore, the case should be remanded."

The affidavit in the case just quoted, *supra*, was made by a special agent of the company, and alleged "that the affiant had good reason to believe, and did believe, that from prejudice and local influence, the defendant would not be able to obtain justice in the State courts:" an affidavit in all respects similar to that filed in the case at bar.

In the case of Smith *v.* Crosby Lumber Company, limited, decided in the Circuit Court for the Western District of Pennsylvania, June 24, 1891, and reported in 46 Federal Reporter, 820, No. 13, September 8, 1891, Mr. Justice Reed followed the ruling of Mr. Justice Harlan in the case of Malone *v.* Richmond & Danville R. R. Co., *supra*, and of Judge Wallace in the case of Amy *v.* Manning, *supra*, holding that the affidavit for removal should state the facts which it is claimed show the existence of prejudice or local influence, and also that upon a motion to remand the court may hear affidavits controverting the allegations of the petition for removal.

The tenor of all these decisions is to the effect that subsection 3 of section 639 of the Revised Statutes is superseded and repealed by section 2 of the act of March 3, 1887; and further, that the act of 1887 contemplates the exercise of judicial discretion by the Federal court; that the exercise of this discretion must be predicated upon facts and circumstances having a probative force; that said act implies that both parties may be heard upon the subject; that the mere statement of a party's belief without stating any facts or circumstances upon which it is founded is not a traversable fact; that such a statement proves nothing but the opinion of the party; that mere opinion is not proof etc.

We think the question presented here has been substantially decided by this court in the case of *in re* Pennsylvania Co., 137 U. S., 451. In that case this court said:

"There is another question raised in this case on which it is proper that we should express our opinion. It arises upon the following words of the act: "*When it shall be made to appear to said Circuit Court* that from prejudice" etc. How must it be made to appear that from prejudice or local influence, the defendant will not be able to obtain justice in the State court? The act of 1867 only required an affidavit of the party that he had reason to believe that from prejudice or local influence he would not be able to obtain justice in the State court. (Revised Statutes, section 639, article 3.) By the act of 1887 it must be *made to appear* to the court. On this point, also, various opinions have been expressed in the Circuit Courts. Our opinion is that the Circuit Court must be *legally* (not merely morally) satisfied of the truth of the allegation that, from prejudice or local influence, the defendant will not be able to obtain justice in the State court. *Legal satisfaction requires some*

proof suitable to the nature of the case, at least an affidavit of a credible person, and a *statement of facts* in such affidavit which sufficiently evince the truth of the allegation. The amount and manner of proof required in each case must be left to the discretion of the court itself. *A perfunctory showing by a formal affidavit of mere belief will not be sufficient.* If the petition for removal states the facts upon which the allegation is founded, and that petition be verified by affidavit of a person or persons in whom the court had confidence, this may be regarded as *prima facie* proof sufficient to satisfy the conscience of the court. If more should be required by the court, more should be offered. In view of these considerations we are disposed to think that the proof of prejudice and local influence in this case was not such as the Circuit Court was bound to regard as satisfactory. The only proof offered was contained in the affidavit of the general manager of the defendant corporation to the effect that, from prejudice and local influence, the company would not be able to obtain justice in the Court of Common Pleas for Litchfield County, or any other State court to which, etc. We do not say that, as a matter of law, this affidavit was not sufficient, but only that the court was not bound to regard it so, and might well have regarded it as not sufficient."

In the above case the affidavit set forth all the facts as to the existence of the alleged prejudice.

Plaintiff in error was denied the right in the court below to read counter affidavits or to show the non-existence of the alleged local prejudice. This right has been recognized in other courts. See authorities, *supra*, *also*.

Dennison *v.* Brown, 38 Fed. Rep., 535;
Amy *v.* Manning, 38 Fed. Rep., 868;
Curnow *v.* Phœnix Ins. Co., 44 Fed. Rep., 305.

The motion to remand in the case under consideration (Record, 79), is as follows:

IN THE UNITED STATES CIRCUIT COURT FOR THE DISTRICT OF OREGON.

JAMES H. FISK, Plaintiff,
vs.
D.V. B. HENARIE, *et al.*, Def'ts.
} Motion to Remand Cause.

The plaintiff, J. H. Fisk, by his attorneys, moves to remand the above-entitled cause to the Circuit Court of the State of Oregon, from whence it came, on the grounds that this United States Circuit Court has no jurisdiction in the action, neither of the subject-matter of the action nor of the defendants therein, for the reasons following:

1. Because said application for the removal of said cause was not made in time or before trial of said cause in said State court.

2. Because the petition and affidavit for the removal of said cause upon the grounds of local influence or prejudice are insufficient in that they do not set forth the facts or reasons showing said alleged prejudice or local influence.

3. That the rules of practice in said State court provide that copies of all papers filed in any cause pending in said court shall be served upon the adverse party, and that in the absence of such service such papers so filed shall be disregarded; that no service of the said papers for said removal were served upon plaintiff or his counsel, nor does the record show any service thereof.

4. Because said petition and accompanying papers filed for the purpose of removing said cause do not show a proper case for removal.

And plaintiff hereby *denies the existence of any prejudice or local influence* which would prevent said defendants or any of them from obtaining justice in said State court or at all; and plaintiff hereby applies to this court to examine into the truth of said affidavits alleging said prejudice and local influence and the grounds thereof, and thereupon to direct that said action be remanded to the court whence it was removed. This motion is based upon the record and the affidavits herewith filed in support of this motion.

GEO. H. WILLIAMS,
GEO. H. DURHAM, and
H. Y. THOMPSON,
Of Attorneys for Plaintiff.

STATE OF OREGON, } ss:
County of Multnomah, }

Due service of the within motion is hereby accepted, at Portland, Oregon, this 6th day of October, 1887, by receiving a copy thereof, duly certified to as such by Geo. H. Durham, of counsel for plaintiff.

JAS. K. KELLY,
Of Attorneys for Def'ts.

Filed October 8, 1887.

R. H. LAMSON,
Clerk.

It will be observed that this motion to remand contains a *direct and positive traverse* of the allegations in the petition and affidavit for removal in reference to the charge of prejudice and local influence, and thus created an issue which, in any event, whether the affidavit for removal was or was not *prima facie* sufficient to warrant an order of removal, it was the duty of the court below to hear and adjudicate, and which he declined to do. (Record, 80-81).

This court has held in construing the first section of the act of March 3, 1887, as amended by the act of August 13, 1888, that issues of fact as to citizenship may be made in removal cases and must be tried in the Federal court.

In the case of Kansas City Railway Company against Daughtry, 138 U. S., 302, this court, speaking by Mr. Justice Gray, said:

"The Supreme Court of Tennessee was of opinion that it was competent for the State Circuit Court to pass upon the issue of fact made by the affidavit of Daughtry upon the statement in the petition in regard to his citizenship and to retain the suit because on that issue the railroad company had not shown that it was a citizen of Tennessee; but it is thoroughly settled that issues of fact raised

upon petitions for removal must be tried in the Circuit Court of the United States. Crehore *v.* Ohio and Mississippi Railway, 131 U. S., 240; Burlington, Cedar Rapids, &c. Railway *v.* Dunn, 122 U. S., 513; Carson *v.* Hyatt, 118 U. S., 279."

The above case was under the act of August 13, 1888.

Point V.

A plea in abatement not necessary.—A traverse on motion to remand sufficient.

In the case of Curnow *v.* Phœnix Insurance Company, 44 Fed. Rep., 305, decided by Judge Simonton in the Circuit Court for the District of South Carolina, December 11, 1890, the court said:

"This action was commenced in the State court. It has been removed into this court upon the petition of defendant solely upon the allegation of diverse citizenship. The plaintiff thereupon filed in this court her petition, in which she denies diverse citizenship, and alleges that she is a citizen of the State of Connecticut, under whose laws the defendant was incorporated. She now moves to remand the cause to the State court. The defendant excepts to this mode of proceeding, and insists that the motion to remand admits the fact set out in the petition for removal. Counsel relies on the case of Buttner *v.* Miller, 1 Wood, 620, and Ives *v.* Railroad Co., 3 Woods, 308; that the only mode of obtaining the relief sought is by plea and abatement (Coal Co. *v.* Blatchford, 11 Wall., 178), or a traverse of the allegation of citizenship. Whatever may be the result of a motion to remand unsupported by petition or affidavit, the present is not that case. The plaintiff has filed her petition denying the statement of the defendant as to the citizenship of the parties, and alleging that both the plaintiff and defendant are citizens of the same State, bases her motion on these facts. She challenges the jurisdiction of this court, and gives the ground for the exception. *Under these circumstances it is the duty of the court to examine into the question.*"

The court then cites the authorities, *supra*, and then says:

"The issue is made up from contradictory statements made by the parties. Let the petition to remand be filed and be treated as a traverse to the petition to remove, and let a day be set for the trial of the issue made."

The plaintiff was within the rule in making positive denial in the Circuit Court in his motion to remand of the existence of the alleged prejudice and local influence in the State, and was not bound to resort to a plea in abatement.

Kingbridge *v.* Otoe Co., 120 U. S., 225;
Morris *v.* Gilmore, 129 U. S., 316.

But aside from all this the question is settled by the act of March 3, 1875, making it the duty of the court to dismiss a case on its own motion and in absence of any plea or denial whenever it shall appear there is a lack of jurisdiction.

Nashua and L. R. Corp. *v.* Boston & L. R. Corp., 136 U. S., 373.
Anderson *v.* Watt, 138 U. S., 701.

Point VI.

Eighth Assignment of Error.

By this point we include our eighth assignment of error, which is to the effect that there never had been, at the date of the motion to remand or since, any adjudication by the court below, or any record of any such adjudication made to the effect that it had been at any time, or in any manner, *made to appear* to said court, in such suit, that there existed such prejudice or local influence as would prevent defendants from obtaining justice in the State courts, and because there never was any order or adjudication of the court below, or any record of any order directing the removal of this suit to the Circuit Court.

It will be seen on an inspection of the record in this case that there is no record whatever showing that this cause was ever at any time by any order of the court below removed from the State to the Federal court, and, therefore, for this reason, we insist on a reversal of the judgment of the court below on the ground of an entire lack of jurisdiction.

If the Circuit Court of the United States ever acquired jurisdiction of this case it did so on the happening of some particular event, and at some definite time, and by action had in pursuance of, and in accordance with, the provisions of the statute relating to removals. The action that confers jurisdiction, it is submitted, is the filing of the transcript from the State court in the office of the clerk of the United States Circuit Court *after* it has *been made to appear* to the Circuit Court on proper application, that there exists such local prejudice contemplated by the statute, and *after* such court has directed a removal, and the time when such jurisdiction attaches is the date of such filing. If for any reason jurisdiction did not then attach, then it was the plain duty, it is respectfully submitted, of the Circuit Court to remand the case on proper application, and failing in this, or, in other words, deciding adversely the application of plaintiff to remand, could not and did not confer jurisdiction if such jurisdiction had not already attached.

In Crehore against the Ohio and Mississippi Railway Co., 131 U. S., 340, this court, opinion by Mr. Justice Harlan, said:

"The effect of filing the required petition and bond in a removal case, as said in Railroad Company *v.* Mississippi, 102 U. S., 135–141, is that the State court is 'without jurisdiction' to proceed further in the suit; or in Railroad Co. *v.* Koontz, 104 U. S., 514, 'its rightful jurisdiction' came 'to an end'; or Steamship Co. *v.* Tugman, 106 U. S., 118–122, 'upon the filing therefor of the petition and the bond, the suit being removable under the

statute, the jurisdiction of the State court absolutely ceased and that of the Circuit Court of the United States immediately attached.'"

Moreover, it has been frequently decided by this court that where a removal is had upon the ground of diverse citizenship of the parties, unless all the requirements of the statute necessary to confer jurisdiction are complied with in the first instance and previous to the filing of the record of the case in the United States Circuit Court, the case must be remanded, and no power of amendment either in the State court or the United States court exists for the purpose of supplying any jurisdictional fact; and this court, in the case of Crehore *v.* Ohio and Mississippi Railway Co., 131 U. S., *supra*, in discussing this point, says:

"If a suit entered upon the docket of a Circuit Court as removed upon the ground of the diverse citizenship of the parties was never in law removed from the State court no amendment of the record made in the former could affect the jurisdiction of the latter or put the case rightfully on the docket of the Circuit Court as of the date when it was there docketed; for the only mode provided in the act of Congress by which the jurisdiction of the State court of a controversy between citizens of different States can be divested is by presenting a petition and bond in that court showing in connection with the record a case that is removable. The present motion in effect is that such amendment of the record may be made in the Circuit Court as will show that this case *might* have been removed from the State court, not that in law it has ever been so removed."

It is respectfully submitted that this same rule and the reasons for it exist in reference to a case removed upon the ground of prejudice and local influence, and therefore inasmuch as the act of 1887 required that the application for removal in this case should be made to the *United States Circuit Court* and not to the *State court*, and

inasmuch as the application as a matter of fact was made to the *State court alone*, and *not* to the United States Circuit Court, and as no order was ever made by the court below directing the removal of the cause, and as the order of Judge Shattuck of the State court directing a removal was clearly without jurisdiction, and therefore void, it follows beyond the power of successful controversy, it seems to us, that the whole proceeding from beginning to end was *absolutely void*, the State court never ceased to have jurisdiction of the cause, and that no jurisdiction whatever attached to the United States Circuit Court.

See also Jackson *v.* Allen, 132 U. S., 27.

Point VII.

Ninth, Tenth, and Eleventh Assignments of Error.

This is an action against all the defendants jointly upon a contract of employment with plaintiff. Three of the defendants, with the plaintiff, were at the date of the commencement of the action, and at the date of the removal, citizens of Oregon, and three citizens of California. Upon the application of the California defendants, the case was removed into the Federal court and tried there, as though none of the defendants were citizens of Oregon.

It will be admitted, and was by the court below (Record, 86), that before the act of 1887 this case could not have been removed into the Federal court by the defendants, a part of whom were citizens of Oregon.

Coal Company *v.* Blatchford, 11 Wallace, 172.

The effect of the decision of the court below upon this point is greatly to enlarge the jurisdiction of the Federal courts, when the whole scope and purpose of the act is to reduce that jurisdiction.

Our first contention in this connection is, that the con-

troversy between citizens of different States must be separable from the controversy between citizens of the same State if, indeed, it shall be held (and we insist it can not) that clause 4 of section 2, act 1887, contemplates, unlike subdivision 3 of section 639, Revised Statutes, the removal of a suit in which one or more of the parties on one side of the controversy are citizens of the same State of those, or some of them, who are on the other side of the controversy. There was no separable controversy here. The plaintiff was a party to the contract on the one side and *all* the defendants were a party to the contract on the other side.

Under the removal act of March 2, 1867, subdivision 3, section 639, Revised Statutes, providing for removal on the ground of prejudice, the question of separable controversy did not apply.

In Young *v.* Parker, 132, U. S., 267, opinion by the chief justice, this Court said:

"There was no separable controversy here. * * * But if there were, provisions as to the removal of such a controversy have no application to a removal on the ground of local prejudices, under the act of March 2, 1867, upon which these petitions were based. (Jefferson *v.* Driver, 117 U. S., 242.) The provisions of that act are reproduced in the 3d subdivision of section 639 of the Revised Statutes, and it is essential, in order to such removal, where there are several plaintiffs or several defendants, that all the necessary parties on one side must be citizens of the State where suit is brought, and all the other side must be citizens of another State or States, and the proper citizenship must exist when the action is commenced as well as when the petition for removal is filed.

Sewing Machine Cases, 18 Wall, 553;
Vannever *v.* Bryant, 21 Wall., 41;
Bible Society *v.* Graves, 101 U. S., 610;
Continental Iron Co. *v.* Ashton, 118 U. S., 54;
Hancock *v.* Holbrook, 119 U. S., 586;
Fletcher *v.* Hamlet, 116 U. S., 408.

"It does not appear from either of these petitions and affidavits that diverse citizenship existed between the complainant and all the necessary defendants at the time the petitions and affidavits were severally filed, the cause was not properly removed, and the State court has never lost jurisdiction. Stevens *v.* Nichols, 130 U. S., 230; Crehore *v.* Ohio and Mississippi Ry. Co., 131 U. S., 240, and cases cited."

Congress clearly did not intend by clause 4, section 2, of the removal act of 1887 to create a *new* jurisdiction, or in any respect enlarge the jurisdiction of the circuit courts, in respect of controversies between citizens of different States over that already created and conferred by the Constitution, and by section 1 of the act of 1887; but only intended, it is submitted, to provide by such clause that in certain of *such* suits, any one of the defendants might, provided he made application before trial and should make it appear to the Circuit Court that by reason of the existence of prejudice or local influence he could not get justice in the State courts, have such suit removed from the State to the Circuit Court. This is manifest first, from the fact that clause 4 of section 2 is not limited in its provisions to suits which shall be commenced in any State court *subsequent* to the passage of the said act of 1887, but it in *express terms* includes as well all suits *pending* in any State court at the date of the passage of said act.

The first lines of clause 4, section 2, of the act of 1887 read as follows:

"And where a suit *is now pending*, or may be *hereafter brought* in any State court," etc.

Surely it will not be seriously contended, and certainly can not be successfully maintained that Congress intended by this section of an act which all concede had for its primary purpose the restriction of the jurisdiction

of the Federal courts, to bring suits that might at the date of the passage of such act be pending in a State court, but of which under then existing legislation, the Circuit Court could not by reason of diverse citizenship, or on any other ground whatever, have entertained original jurisdiction.

What character of "suits," let us inquire, is it that any defendant may under clause 4, section 2, of the removal act of 1887, be permitted to remove into the Circuit Court, by making it appear to such court that by reason of prejudice or local influence he can not obtain justice in the State courts? It is not, it is submitted, *every kind of suit.* It is only those cases where a "suit" is pending in a State court, whether commenced before or after the passage of the act of 1887, "*in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State.*" There is nothing whatever, it is submitted, in this clause 4 or in this section that in any manner can be construed as intended to define what is meant by such a suit. It nowhere appears, either expressly or by any fair inference, that a cause wherein one or more of the defendants are citizens of a State other than that of which the plaintiff is a citizen, and one or more of the defendants are citizens of the same State as the plaintiff, is *such a suit.* Where, therefore, are we to look for a definition, either legislative or judicial, as to what is meant by the clause 4 in section 2 of the act of 1887—"a suit in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State?" If this clause is in any essential respect different in so far as it bears upon the question under consideration, from clauses of like character in former statutes, or from the jurisdictional clause in section 1 of the act of 1887, or if its ordinary well-understood meaning is in any respect modified by any other words in the same clause or of any

other, then we may not with either force or propriety insist that judicial construction of such clauses has any weight here; if however, it is apparent on careful comparison that the clauses are in all respects in substance and intent the same, and that there are no modifying words in the act, then may we confidently expect that the construction placed by this court heretofore on such similar jurisdictional clauses will have application here?

Inasmuch as this court has heretofore in numerous cases, notably in the case of Smith *v.* Lyon, 133 U. S., 315 given construction to *like* clauses and in the case just quoted to the clause in section 1 of the act of 1887, it is only necessary to establish the fact that the clause 4 *supra* in section 2 of that act is in all respects, in so far as it relates to the precise question under consideration, similar *substantially* in phraseology, and *precisely* in scope and intent, to that in section 1 of the act, in order that we may insist on application here of the construction placed upon section 1 by this court, and rest our case in so far as this particular contention is concerned on the authority of Smith *v.* Lyon, *supra*.

It has been held by this court in numerous cases that the following clauses—in the several statutes enacted by Congress from time to time—in so far as the *unity of State citizenship* of the respective parties to the suit or controversy, plaintiffs and defendants, where there are more than one of either is concerned, *mean precisely in law one and the same thing*, save and except *that* clause contained in the act of July 27, 1866, where Congress qualified the clause, or rather enlarged it by providing in *express* terms for a *severance* of defendants in the case of a removal from a State court in a certain class of cases fully recognized by that act, and by it alone, where a citizen of the State where the suit is brought and of the same State of which the plaintiff is a citizen is or shall be a defendant.

The different clauses, in so far as they shed light on this particular point, are as follows:

1st. Judiciary Act, 1789, Section 11.

"Where the *suit* is between a citizen of the State where the suit is brought and a citizen of another State."

2d. Act July 27, 1866, Section 1.

"If in any *suit* in any State court * * * by a citizen of the State in which the suit is brought against a citizen of another State * * * a citizen of the State in which the suit is brought is or shall be a defendant * * * may * * * file a petition for removal * * *."

3d. Act March 2, 1867, Section 1.

"Where a *suit* * * * in which there is *controversy* between a citizen of the State in which the suit is brought and a citizen of another State * * * such citizen of another State, whether he be plaintiff or defendant, * * * may file a petition for removal," etc.

4th. March 3, 1875, Section 1.

"All *suits* * * * in which there shall be a *controversy* between citizens of different States."

This section relates to original jurisdiction. Section 2, relating to removals, being identical with the above, is as follows:

"That any *suit* * * * in which there shall be a *controversy* between citizens of different States * * * either party may remove said suit," etc.

5th. Act of March 3, 1887, Section 1.

"Of all *suits* * * * in which there shall be a *controversy* between citizens of different States. * * * But where the jurisdiction is founded only on the fact that the *action* is between citizens of different States, suit shall be brought only in the district of the *residence* of either the plaintiff or the defendant."

All the above different clauses, save and except that one in the act of 1866, are held to mean, as stated by Chief Justice Marshall, in Strawbridge *v.* Curtiss, 3 Cranch., 267:

"That each distinct interest should be represented by persons, all of whom are entitled to sue, or may be sued in the Federal courts. That is, where the interest is joint, each of the persons concerned in that interest must be competent to sue, or liable to be sued, in the courts of the United States."

Or, as stated by Mr. Justice Field in the case of Coal Company *v.* Blatchford, 11 Wall., 172:

"In other words, if there are several co-plaintiffs, the intention of the act is that each plaintiff must be competent to sue, and if there are several co-defendants, each defendant must be liable to be sued, or the jurisdiction can not be entertained."

In the case of the Sewing Machine Companies, 18 Wall., 553, this court, opinion by Mr. Justice Clifford, in discussing this very question and in giving construction to the act of March 2, 1867, said:

"Much stress is placed upon the particular language of that act," (referring to the removal act of March 2, 1867), "which is that 'when a *suit* is now pending or may hereafter be brought in any State court, *in which there is controversy between a citizen of the State in which the suit is brought and a citizen of another State.*' Instead of that the corresponding language of the judiciary act is, if a *suit* be commenced in any State court by *a citizen of the State in which the suit is brought against a citizen of another State.* Different words are certainly employed in the two provisions, but it is difficult to see in what particular the jurisdiction of the State court is lessened by the last act, or in what respect the difference of phraseology supports the theory of the defendants, as 'a *suit* by a plaintiff against a defendant' must mean substantially the same thing in the practical sense as 'a

suit *in which there is controversy* between the parties,' as each provision includes the word *suit*, which applies to any proceeding in a court of justice in which the plaintiff pursues his remedy to recover a right or claim."

We take it this case, as to this point, has been substantially decided in accordance with our views by this court, in the case of Smith *v.* Lyon (133 U. S., 315). In that case the facts were as follows: There were two plaintiffs and one defendant. One of the plaintiffs was a citizen of the Eastern District of Missouri, in which the suit was brought, being an original suit; the other plaintiff was a citizen of the State of Arkansas, while the defendant was a citizen of the State of Texas. Two points arose in the consideration of the case—the one was whether, under the following clause in section 1 of the removal act of 1887, "where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant," its requirement was met by the suit being brought in the district where only *one* of the plaintiffs resided—the co-plaintiff being a resident of another State. This court held that the suit was not properly brought, and that to meet the requirements of the above clause, *both* plaintiffs should have been residents of the district where the suit was brought. But the other and more important question considered and passed upon by the court, and which has direct bearing on the question now under consideration, was as to the proper construction and meaning of the clauses in the first section of the removal act of March 3, 1887, as amended by the act of August 13, 1888, and which read as follows:

"All *suits* of a civil nature * * * *in which there shall be a controversy between citizens of different States.*"

And:

"But where the jurisdiction is founded only on the fact that the *action is between citizens of different States*, suit shall be brought only in the district of the *residence* of either the plaintiff or the defendant."

This court held in that case, if we correctly understand it, that those portions of the two clauses in section 1, act 1887, just quoted, which are *italicized*, as above, mean the same, in so far as they relate to the relation the respective parties to the *suit* or *controversy* must bear to each other, as does the following clause in section 11 of the judiciary act of 1789:

"Where the *suit* is between a *citizen of the State where the suit is brought and a citizen of another State*."

If we are not mistaken in our understanding of this case it was held in the opinion delivered by Mr. Justice Miller that the same construction as to the citizenship of parties in order to confer jurisdiction on the United States Circuit Court, should be placed on the first section of the act of March 3, 1887, as had been placed on the judiciary act of 1789 by this court in the case of Strawbridge *v.* Curtiss (3 Cranch., 257), opinion by Chief Justice Marshall, followed in New Orleans *v.* Winter, 1st Wheat., 91; case of Coal Company *v.* Blatchford, 11 Wall., 172, and numerous other cases, and which was again placed upon the act of March 2, 1867, in the case of the Sewing Machine Companies, 18 Wall., 553, and again on the second section of the act of March 3, 1875, in the removal cases, 100 U. S., 457, and in the Peninsular Iron Co. *v.* Stone, 121 U. S., 631, where the Chief Justice reviewed all the cases and reaffirmed the doctrine as applicable to cases arising under the act of 1875, and which has been subsequently in numerous cases adhered to.

In the case of Smith *v.* Lyon (*supra*) Mr Justice Miller

in delivering the opinion of the court, wherein construction is given to section 1 of the removal act of 1887, after holding that inasmuch as the suit in that case was brought in a State of which only one of the plaintiffs was a citizen while the co-plaintiff was a citizen of another State, and inasmuch as the act required the suit to be brought in cases where the jurisdiction is founded *solely* on the fact that the *action* is *between citizens of different States*, only in the district of the residence of either the plaintiff or the defendant, that the court had no jurisdiction for these reasons alone, proceeded to the more important point and said:

"It may be conceded that the question thus presented, if merely a naked one of construction of language in a statute introduced for the first time, would be one of very considerable doubt; but there are other considerations which must influence our judgment, and which solve this doubt in favor of the proposition that such a suit can not be sustained. The original judiciary act of 1789, which established the courts of the United States and defined their jurisdiction, declared in reference to the circuit courts, in section 11 of that act (1 Stat., 78), that 'the circuit courts shall have originul cognizance concurrent with the courts of the several States of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of $500, and the United States are plaintiffs or petitioners, or an alien is a party, or the suit is *between a citizen of the State, where the suit is brought and a citizen of another State.*' The construction of this phrase '*where the suit is between a citizen of the State where the suit is brought and a citizen of another State*' came before the Supreme Court at an early day in the case of Strawbridge *v.* Curtiss (3 Cranch., 267), and Chief Justice Marshall delivered the opinion of the court, which was without dissent, in the following language:

"'The court understands these expressions" (referring to the words '*suit between a citizen of the State where the suit is brought and a citizen of another State*') "to mean that each distinct interest should be represented by persons

all of whom are entitled to sue or may be sued in the Federal courts; that is, that where the interest is joint, each of the persons concerned in that interest must be competent to sue, or liable to be sued, in the courts of the United States.'

"This construction has been adhered to from that day to this, and, although the statutes have modified the jurisdiction of the court as regards the amount in controversy and in many other particulars, the language construed by the court in Strawbridge *v.* Curtiss has been found in all of them. This statute, conferring and defining the jurisdiction of circuit courts of the United States, has been re-enacted and recast several times since the original decision of Strawbridge *v.* Curtiss. The first of these was the general revision of the statutes of the United States passed in 1874, in which the language of the statute of 1789 is supposed to be reproduced accurately. But the act of March 3, 1875 (18 Stat., 470), undertook to recast the jurisdiction of the circuit courts, and its first section, the important one in this connection, contains the same language in regard to the jurisdiction of the court in controversies between citizens of different States. * * * The statute remained in this condition until the act of 1887, which we are now considering, as amended by the act of August 13, 1888."

Mr. Justice Miller, proceeding further in the opinion in this case, says:

"During this period, and since the case of Strawbridge *v.* Curtiss, this jurisdictional clause has been frequently construed by this court and that case has been followed. In the case of New Orleans *v.* Winter, 1 Wheat., 91, the same question arose, and was decided in the same way."

Mr. Justice Miller then refers to the case of Coal Company *v.* Blatchford, 11 Wall., 172, cites with approval the language of Mr. Justice Field in that case as quoted above, and, proceeding further with the opinion in Smith *v.* Lyon, says:

"This question was very carefully considered in the case of the Sewing Machine Companies, 18 Wall., 553,

where the same proposition is stated in almost the identical language. And in the case of Peninsular Iron Company *v.* Stone, 121 U. S., 631, the Chief Justice reviews all these cases and reaffirms the doctrine as applicable to cases arising under the act of 1875. The statute which we are now construing leaves out the provision that if the party has the diverse citizenship required by the statute he may be sued in any district where he may be found at the time of the service of process. The omission of these words and the increase of the amount in controversy necessary to the jurisdiction of the Circuit Courts, and the repeal of so much of the former act as allows plaintiffs to remove causes from the State courts to those of the United States, and many other features of the new statute, *show the purpose of the legislature to restrict rather than to enlarge the jurisdiction of the circuit courts*, while at the same time a suit is permitted to be brought in any district where either plaintiff or defendant resides."

This opinion concludes as follows:

"We do not think, in the light of this long continued construction of the statute by this court during a period of nearly a hundred years, in which the statute has been the subject of renewed legislative consideration and of many changes, it has always retained the language which was construed in the case of Strawbridge *v.* Curtiss, that we are at liberty to give that language a new meaning when it is used in reference to the same subject-matter. It is not readily to be conceived that the Congress of the United States, in a statute mainly designed for the purpose of *restricting the jurisdiction* of the circuit courts of the United States, *using the language which has been construed in a uniform manner for over ninety years by this court*, intended that that language should be given a construction which would enlarge the jurisdiction of those courts, and which would be directly contrary to that heretofore placed upon it by this Court."

The jurisdictional clauses of the original judiciary act of 1789, also of section 1 of the act of 1887, relating to original jurisdiction of the circuit courts, and which were construed by this court in Smith *v.* Lyon, 133 U. S.,

and of clause 4 of section 2 of the act of 1887, relating to the removal of suits, are for convenience of the court placed in parallel columns, or at least so much thereof as is necessary to a complete comparison, as follows:

Section 11, act 1789:

"Where the *suit* is *between a citizen of the State where the suit is brought and a citizen of another State.*"

Section 1, act 1887:

"That the Circuit Courts of the United States shall have original cognizance concurrent with the courts of the several States of all '*suits*' of a civil nature * * * '*in which there shall be a controversy between citizens of different States.*'"

Clause 2, section 1, act 1887:

"But where the jurisdiction is founded only on the fact that the *action is between citizens of different States*, suit shall be brought only in the district of the *residence* of either the plaintiff or the defendant."

Section 2, clause 4, act 1887:

"And where a '*suit*' is now pending, or may be hereafter brought in any State court, '*in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State,* * *'"

* * * * *

"Any defendant, being such citizen of another State, may remove *such suit* into the Circuit Court * * * at any time before the trial thereof when it shall be made to appear to said Circuit Court that from prejudice or local influence, etc., * * * provided, if it further appear that said suit can be fully and justly determined as to the *other defendants* in the State court, without being affected by such prejudice or local influence, and that no party to the suit will be prejudiced by a separation of the parties, said Circuit Court may direct the suit to be remanded, so far as relates to such *other defendants*, to the State court to be proceeded with therein."

It will be perceived that the only difference in these clauses is one that can have no possible bearing upon the precise point under consideration, and it is this:

In section 1 of the act of 1887, in order to confer original jurisdiction on the circuit courts, on the sole ground of diverse citizenship, it is only necessary that the suit shall be one in which there shall be a controversy between citizens of *different States*, and that such suit shall be brought in the district in which either the plaintiff or defendant *resides*. (McCormick *v.* Harvesting Machine Co., 134 U. S., 41.) In other words, to confer original jurisdiction under section 1, based solely on diverse citizenship, it is not necessary that either plaintiff or defendant should be a *citizen* of the State *in which the suit is brought*, although in all *such cases* the suit must, under section 1 of the act, be brought "only in the district of the *residence* of either the plaintiff or the defendant;" while under clause 4, section 2, of the act of 1887, in order to enable a defendant to remove a cause to the Circuit Court, it is necessary that the suit should be one "in which there is a controversy between a citizen of the *State in which the suit is brought* and a citizen of another State."

Aside from this difference which, as we have stated, can have no possible bearing upon the precise question under consideration, the two clauses are in all respects precisely the same. In each case the suit must be one in which there is a controversy between citizens of different States. In the case of original jurisdiction, it is immaterial as to what States the respective parties are citizens of. The suit, however, in such a case, namely, where the jurisdiction is invoked *solely* on the ground of diverse citizenship, must be brought in the district which at the time of the commencement of such suit is the *residence* of either the plaintiff or the defendant, instead of in any district, as under former acts, where

the defendant might be found; while under clause 4 of section 2, in order to entitle a defendant to a removal, the suit must also be one in which there is a controversy between citizens of different States. In that case, however, either the plaintiff or defendant, one or the other, must be a citizen of the State in which the suit is brought, while the other must be a citizen of another State.

Wherein, then, do the provisions of clause 4 of section 2 of the act of March 3, 1887, under which this cause was removed, differ as to jurisdictional requirement from section 1 of said act, the provisions of which latter section, as we have seen, are "of all *suits* in which there shall be a controversy between citizens of different States," and, "where the jurisdiction is founded only on the fact that the action is between citizens of different States," and which provisions were construed by this court in Smith *v.* Lyon (133 U. S., 315); or wherein does said clause 4 of section 2 differ in legal effect in the respect stated from the jurisdictional clauses in the Constitution and statutes relating to diverse citizenship, that is, "to *controversies* between citizens of different States," as in the Constitution; "to *cases* where the *suit* is between a citizen of the State where the suit is brought and a citizen of another State," as in the judiciary act of 1789; "to *cases* where there is a *suit* in which there is *controversy* between a citizen of the State in which the suit is brought and a citizen of another State," as in the act of March 2, 1867; "to *suits* in which there shall be a *controversy* between citizens of different States," as in the act of March 3, 1875. It is respectfully submitted there is no material difference even in phraseology in so far as the particular point under consideration is concerned, and no difference whatever in *legal effect* between any two or more of the several clauses just quoted.

Any cause to be removable under clause 4, section 2,

of the act of 1887, even though such clause should be considered as an *independent act*, and without any reference whatever, either to other clauses of the same section or any of the provisions of section 1 of said act, and as to this we will refer later on, must be a "*suit*" in which there is *a controversy between a citizen of the State in which the suit is brought and a citizen of another State.* So far, then, this phraseology is almost identical with that contained in section 1 of the same act which, as we have seen, was construed in Smith *v.* Lyon, *supra*, as meaning that *all* the parties to one side of the controversy must be citizens of a State *other* than that of which all the parties to the other side are citizens.

To what extent, if any, then, is this meaning changed by anything that follows, either in clause 4 of section 2, or in any other part of the act? We submit confidently, in no respect whatever, in so far as it relates to the *precise question* now under consideration, namely, whether or not it was the intention of Congress by this section to confer jurisdiction on the Federal courts by removal from a State court of causes wherein part of the defendants are citizens of the same State of the plaintiff, and where the interests of all the defendants are joint and not separable, as in the case at bar. The clause further provides that in such a suit as is above described—because it is only in a suit *such as described in the first part of clause 4 of section 2*, that a removal for prejudice can be had—"any defendant, being such citizen of another State, may remove such suit," &c. Surely there is nothing in this clause that would indicate or in any respect justify the construction, that in such a suit the defendant or defendants not so applying to remove are to be regarded as citizens of the *same State as the plaintiff*. There is nothing in this provision that would *require* a construction that the *other defendant*, or *defendants*, might not have the right also, under the law to apply for a removal, as the clause

simply authorizes any one of the defendants in *such a suit* as is above described to apply for a removal of the suit, and to have it removed, irrespective of the fact as to whether any of his co-defendants join with him in such application. But what more? After such suit has been so removed to the Circuit Court, "if it further appear that said suit can be fully and justly determined as to the other defendants in the State court without being affected by such prejudice or local influence, and that no party to the suit will be prejudiced by a separation of the parties, said Circuit Court may direct the suit to be remanded, so far as it relates to such *other defendants*, to the State court, to be proceeded with therein."

There is nothing in this clause, it is confidently submitted, from which it can be properly inferred that Congress meant or intended to be understood by the words "*other defendants*," to refer to or include defendants in any *suit* other than of the character described in the first part of clause 4, section 2. Surely that first portion of such clause must govern and control all the way through, and Congress, in the provision just quoted, intended to include only *such suits* as had for necessary parties *citizens of different States*, and the clause "*other defendants in the State court*" in the provision, is intended, we submit, to refer to such defendants as are citizens of the same State as that of the defendant applying for removal, and to such other defendants, if any, as are citizens of some State *other* than that of which the plaintiff is a citizen, and yet of a State different from that of which the moving party is a citizen, but who have not joined in such application.

There is nothing whatever in the clause to forbid, but much to warrant the construction that Congress intended by the phrase, "*other defendants in the State court*," to include *only* such defendants as are citizens of a State *other*

than that of which the plaintiff is a citizen, and also of a State *other* than that in which the suit is brought, thus bringing the legislation of Congress and the jurisdiction of the court into what would seem to be full accord with previous legislation and adjudications, and clearly within the *undisputed scope* of the constitutional provision which provides that "*the judicial power shall extend to controversies between citizens of different States*" whatever construction may be placed on it.

It will be observed, however, that this clause differs materially from the second clause of section 2 of the act of 1875 and other previous acts in the following respect: The question whether the suit contains a separable controversy is to be determined under the fourth clause of the second section of the act of 1887, *after* the Circuit Court has taken jurisdiction of the cause. If not separable, the Circuit Court is to *retain* jurisdiction of the *entire* suit. If the suit contains separable controversies, it may be remanded so far as it relates to the other defendants, provided, as we have seen, that no party will be prejudiced thereby. (Speer on Removal of Causes, section 39.)

Is it probable that Congress, after a hundred years, during all of which time every act that has been passed on the subject of jurisdiction of Federal courts on the sole ground of the *suit*, or the *controversy* in the suit being between citizens of different States, has been construed by this court to mean in all such suits in which there are several plaintiffs, that each plaintiff must be competent to sue, or if several defendants, each defendant must be liable to be sued, and when in all that time no removal from a State to a Federal court has been authorized, where part of the defendants were citizens of the same State as that of the plaintiffs, and the interests of all the defendants were joint and not separable, would now in an act clearly intended to *restrict the jurisdiction*

of the Circuit Courts, incorporate a provision compelling a defendant in a suit to leave the courts of his own State against his will, and go into the Circuit Court to litigate a controversy between a citizen of his own State and himself.

What, then, did Congress mean by this clause? Simply this and nothing more: That in a *suit* in which "there shall be a controversy between citizens of different States," as provided in section 1 of the act of 1887; or in other words, meaning the same thing precisely as to the point under consideration, as provided in clause 4 of section 2 of the act of 1887, "where a *suit* in which there is a *controversy* between a citizen of the State in which the suit is brought and a citizen of another State," that any one of the defendants who is a citizen of a State other than that in which the suit is brought, for if a suit happens to be brought in a State where the defendants reside they can not remove the same, may, on proper application to the proper court, remove the *whole suit* into the Circuit Court, and may there *compel* all the other defendants, citizens of a State, or States, *other* than that in which the suit is brought, and who are not citizens of the same State of which the plaintiff or plaintiffs, or parties to the other side of the controversy are citizens, to abide by that jurisdiction, whether they join in the application for removal or not, unless indeed they are able to make it appear to the Circuit Court after it has acquired jurisdiction of the case by removal, or unless in any manner it is made to appear to such Circuit Court, that such suit can be fully and justly determined as to such *other defendants in the State court*—meaning *citizens of a State, or States, other than that* of which the plaintiff is a citizen, without being affected by such prejudice or local influence, and that no party to the suit will be prejudiced by a separation of the parties, in which event the Circuit Court may direct such suit to be remanded to the State court in so far as it relates to such

other defendants. It is manifest, therefore, as it seems to us, that Congress never intended by anything contained in the removal act of 1887 to compel a defendant a citizen of the same State of that of the plaintiff to submit his suit to the jurisdiction of a Federal court with defendants who are citizens of a State other than that of the plaintiff the interests of the defendants being joint, simply because the non-resident citizen defendant may elect to have his suit heard by a Federal court, and a *fortiori* may a plaintiff who has a claim *jointly* against a number of defendants rightfully protest under this act against having his cause relegated to the Federal court, simply because one or more of the defendants may happen to be citizens of a State other than that in which he has brought his suit, and of which he is a citizen, and where such suit as to all the defendants is joint in interest and not separable.

That Congress never intended to confer jurisdiction on a Federal court by removal of a suit from a State court where one or more of the defendants are citizens of a State other than that of which the plaintiff is a citizen, and other than that in which the suit is brought, and in which other of the defendants are citizens of the same State of the plaintiff, and where the interests of all the defendants are joint, is manifest from a careful consideration of all the provisions of the act of March 3, 1887. Especially is this so in the light of the opinion of this court in Smith *v.* Lyon, *supra*. The fact that in clause 3, section 2, of that act Congress in providing for the removal of a suit on the sole ground of diverse citizenship was careful to provide it should only include suits wherein there was a "controversy which is *wholly* between citizens of different States," and which could "be fully determined as between them," and which is precisely the same phraseology employed in clause 2 section 2 of the removal act of 1875 (except in the latter either one or more of

either plaintiffs or defendants could cause a removal, while in the act of 1887 only one or more of the defendants can do so) shows clearly the intention of Congress to adhere to the long-established rule that, as stated by this court in Hyde *v.* Ruble, 104 U. S., 407, in construing clause 2 of section 2, act 1875, "to entitle a party to removal under this clause, there must exist in the suit a separate and distinct cause of action in respect to which all the necessary parties on one side are citizens of different States from those on the other."

Blake *v.* McKim, 103 U. S., 339;
Hyde *v.* Ruble, 104 U. S., 407;
Corbin *v.* Van Brunt, 105 U. S., 576;
Westchester *v.* Loud, 108 U. S., 130;
Ayres *v.* Wiswell, 112 U. S., 187;
Louisville & N. R. R. Co. *v.* Ide, 114 U. S., 55;
Pirie *v.* Tvedt, 115 U. S., 44;
Fidelity Ins. Co. *v.* Huntington, 117 U. S., 55;
Speer on Removal of Causes, secs. 28, 29.

Whether, therefore, clause 4 of section 2, act 1887, which is the only clause providing for removal on the ground of diverse citizenship and local prejudice combined, is to be regarded as a separate piece of legislation, complete in itself, and in no respect whatever dependent on any other provision in said act, or any other act, or whether being a part of the same section of such act that provides for all other classes of suits made removable from State to Federal Courts, including that class removable on the ground alone of the diverse citizenship of the parties, it is to be construed in connection with the words: "*Of which the Circuit Courts of the United States are given original jurisdiction by the preceding section,*" in clause 1 of section 2, and with clauses 2 and 3 of such section, and in which case not only all the jurisdictional clauses of section 1 of said act must be considered in de-

termining what suits are removable under clause 4 of section 2, but the words "*which is wholly*," and "*which can be fully determined between them*," in clause *three* of section 2, are to be construed as applying as well to clause *four* of such section, in either event, and we insist the latter is the proper construction, we maintain the construction of clause 4, section 2, must exclude the idea that Congress by such clause intended to confer jurisdiction on the Federal courts by removal from a State court on the ground of diverse citizenship and prejudice of a suit involving a controversy between a citizen of the State in which the suit is brought and a citizen of another State, and in which one or more of the defendants *as in the case at bar* are citizens of the State in which the suit is brought, and of which the plaintiff is also a citizen, and where the interests of all the defendants are joint and not separable.

CLAUSE 4 OF SECTION 2, ACT 1887, MUST BE CONSTRUED IN CONNECTION NOT ONLY WITH CLAUSES 1, 2, AND 3 OF SAID SECTION, BUT ALSO WITH THE JURISDICTIONAL CLAUSES IN SECTION 1 OF SAID ACT.

But further, we respectfully submit that the provisions of clause 4 in section 2 of the act of 1887 must be construed in connection with and held subject to the following limitation in the first part of said section 2, namely, that the application to remove can only be made in a "suit of a civil nature at law or in equity, * * * *of which the Circuit Courts of the United States are given original jurisdiction in the preceding section.*" In other words, that no suit can be removed from a State court on the ground of diverse citizenship and prejudice under clause 4 of section 2 of said act, save and except it is "a *suit* of a civil nature at law or in equity, * * * of which the Circuit Courts of the United States are given original jurisdiction *by the preceding section;*" that is to

say, *by section 1 of the act of 1887*. If this is so, then the decision of this court in the case of Smith *v.* Lyon, *supra*, is decisive in this case, although no more conclusively so, than if clause 4 of section 2 is to be considered and construed as an independent and separate act.

The preceding views as to the proper construction of clause 4, section 2, act 1887, are fully borne out by the decision of this court *in re* Pennsylvania Company, 137 U. S., 451, in which it was held that said clause 4, section 2, must be construed not as an independent act but in connection with all the other sections and provisions of the act; and hence it was there held, contrary to the opinion held by some courts and commentators, that in order that a case could be removed under said clause 4, section 2, on account of diverse citizenship and prejudice, so as to confer jurisdiction on the Circuit Court, the matter in dispute must exceed the sum or value of two thousand dollars, although there is not a syllable on that subject in said clause 4.

This court in that case, *in re* Pennsylvania Company, *supra*, opinion by Mr. Justice Bradley, said:

"We also agree with the circuit judge that by the act of 1887 the matter in dispute must exceed the sum or value of two thousand dollars in order to give the circuit court jurisdiction, as well *in cases sought to be removed from a State court on account of prejudice or local influence as in other cases.* It is true that the clause allowing a removal for such cause does not name any amount as requisite. But we should bear in mind the history of the law *and read the whole of the two sections together.*"

Mr. Justice Bradley, after citing in the opinion in this case the various clauses of section 1 and 2 of the act of March 3, 1887, including the first part of clause 4 of section 2, which commences "*and where* a suit is now pending," etc., says:

"The initial words, '*and where*,' are equivalent to the phrase '*and when in any such case*.' In effect they are tantamount to the beginning words of the third clause, namely, 'and when in *any suit mentioned in this section*.' On this point the circuit judge refers to an opinion of Mr. Justice Harlan in the case of Malone *v.* Richmond and Danville Railroad Company, 35 Fed. Rep., 625, which seems to us to express the correct view of the law."

But we insist further, not only on construction and principle, but also on the authority of the opinion of the late Circuit Judge Sawyer of the Ninth Circuit, concurred in by Mr. Justice Field and Judge Sabin, in the case of the County of Yuba *v.* Pioneer Gold Mining Company and others (32 Fed. Rep., 184), decided in the Circuit Court for the Northern District of California, August 29, 1887, that section 2 of the act of 1887 does not authorize the removal of a suit from a State to a Federal court, which could not have been originally brought in said Circuit Court, and this for the reason that only such causes can be removed under section 2 of the act of which the Circuit Courts have original jurisdiction by virtue of section 1 of said act, and section 1 does not confer jurisdiction upon the Circuit Court on the ground of diverse citizenship, where the plaintiff is a citizen of the State in which the suit is brought, and a part of the defendants are citizens of the same State, while other of the defendants are citizens of another State. Judge Sawyer, in the case of the County of Yuba, *supra*, in construing the act of 1887, said:

"But section 1, to which we must look for jurisdiction, does not provide for or authorize the obtaining of jurisdiction by removal or otherwise. It defines and limits the jurisdiction of the courts and goes no further. Section 2 is the section that authorizes removals, and declares what cases may be removed. The clause of section 2 which covers this case, if any, authorizes the removal of 'any other suit of a civil nature, at law or in equity, of

which the circuit courts of the United States are given original jurisdiction *by the preceding section*,' that is to say, *by section 1.* * * * If the court can have jurisdiction by removal, therefore, it must get it by virtue of the provisions of section 2, and not of the provisions of section 1; and section 2 only authorizes a removal of a case over which jurisdiction is given by section 1, thus referring to section 1 for the class of cases that are authorized to be removed. Section 2 therefore does not reach this case. *It is clear to our minds that Congress only intended to authorize the removal of such cases as could be brought originally in the United States courts, and in the court to which removal is to be made.*"

County of Yuba *v.* Pioneer Gold Mining Co. *et al.*, 32 Fed. Rep., 184.

The court below (opinion, Record, 86) concedes that, we quote, "as the law stood before the passage of the act of 1887 this action could not have been removed to this court by either of the defendants, for some of them are citizens of Oregon, the same State as the plaintiff." The foregoing suggestions, therefore, and reference to authorities stating what the law was prior to the passage of the act of 1887, are not so much for the purpose of establishing a proposition that all concede, but rather for the purpose of showing that in so far as the question involved in this cause is concerned the act of 1887 has made no change in the law whatever, except to limit the right of removal to certain defendants alone—and in certain other respects to restrict materially, instead of enlarging, the jurisdiction of the circuit courts.

Congress, by the act of July 27, 1866, it is true, provided for the removal from a State to a Federal court of a suit in a case where a citizen of the State in which the suit is brought and of which the plaintiff is a citizen, is a defendant, on the application of a defendant who is a citizen of a State other than that in which the suit is brought, yet this was only so by

the express provisions of the act in cases wherein it was sought to restrain or enjoin the defendant, citizen of a State other than that in which the suit was brought; or in a cause where the suit was one in which there could be a final determination of the controversy, so far as it concerned him, without the presence of the other defendants as parties in the cause. In short that act, which stood unrepealed less than eight months, as it was replaced by the act of March 2, 1867, while it recognized the right of a defendant, who was a citizen of a State other than that in which the suit was brought, to remove a suit from a State to a Federal court, even though one or more of his co-defendants were citizens of the same State of that of the plaintiff, and a citizen of the State in which the suit was brought, still no such removal was allowed under *that* act except in a case either where the non-resident citizen was sought to be enjoined or restrained; or where the suit was separable, and one in which there could be a final determination of the controversy so far as it concerned the party causing the removal, and this without the presence of the other defendants.

Congress, therefore, has never yet in any act conferred or attempted to confer jurisdiction on the Federal courts, either original or by removal from *a State court* of a *suit* involving a controversy between citizens of the same State, even though there were other parties to such suit or controversy, citizens of a State other than that of which the plaintiff was a citizen, or of the State in which the suit might be brought, and where the interests of the defendants in such suit were *joint* and not *separable*, except in cases where the subject-matter gave jurisdiction.

There is in the act of 1887 no stronger phraseology indicative of an intention on the part of Congress to confer jurisdiction on the Federal courts of *suits* or *controversies*

between citizens of the *same* State than is contained in the act of March 2, 1867, and yet this court held in the case of the Sewing Machine Companies (18 Wall., 553), that that act did not confer jurisdiction, and did not purport to, on the Federal courts of suits by removal from a State court in which the petitioner, whether plaintiff or defendant, was a citizen of a State other than that in which the suit was brought, and all the other plaintiffs or other defendants were citizens of the State in whose court the suit was pending.

While, therefore, the act of 1887, clause 4, unlike subsection 3, section 639, Revised Statutes, does contemplate a severance in certain cases to be determined after the suit shall have been transferred to the Circuit Court, it only contemplates, we submit, that such severance shall relate to defendants who are citizens of a State other than that in which the suit is brought, and other than that of which the plaintiff or plaintiffs are citizens, and who did not join in the application for removal. And hence if severance is not granted the Circuit Court still, beyond question, has jurisdiction, because in such case all the defendants are citizens of a State other than that in which the suit is brought, and other than that of which the plaintiff is a citizen.

We take it, it will not be seriously questioned that there is anything but a single controversy between the plaintiff and the defendants in this case; that the interests of all the defendants are as *one* and *not divisible*. The authorities bearing upon this question are collated by Mr. Justice Brewer in the case of the Western Union Telegraph Company *v.* Brown and others, decided by him, October 8, 1887, in the Circuit Court for the Eastern District of Missouri. The Justice, after stating the facts, said:

"That there is but a single controversy in the case at

bar is under recent rulings of the Supreme Court not open to question. The action is on a bond, one defendant being principal; the others sureties. The only relief sought is a money judgment against all the defendants. In Ayers *v.* Wiswell, 112 U. S., 187, which was an action to foreclose a mortgage, it was said by the court that 'the fact that separate answers were filed which raised separate issues in defending against the one cause of action, does not create separate controversies, within the meaning of the term as used in the statute. They simply present different questions, to be settled in determining the rights of the parties in respect to the one cause of action for which the suit was brought. In Railroad Co. *v.* Ide., 142 U. S., 52, it was decided that a filing of separate answers, tendering separate issues for trial by several defendants, jointly sued in a State court on a joint cause of action, does not divide the suit into separate controversies so as to make it removable into the Circuit Court of the United States under the last clause of section 2 of the act of March 3, 1875. And in the succeeding case of Putnam *v.* Ingraham, 5 Sup. Ct. Rep., 746, it was ruled that the fact that one of the defendants did not answer, but was in default, was unimportant, and that the default placed the parties in no different positions, with reference to removal, than they would have occupied if that one had answered, and set up an entirely different defense from that of the other defendants. And in the still later case of Pirie *v.* Tveat, 115 U. S., 41, the same rule was applied in an action of tort. So also Sloan *v.* Anderson, 117 U. S., 275, and Insurance Co. *v.* Huntingdon, 117 U. S., 280. These cases put the question at rest and settle that they are not separate controversies, but a single cause of action."

In this case the defendants answered separately, but "separate defenses do not necessarily make separable controversies for the purpose of removal." (Little *v.* Giles, 118 U. S., 596.)

Besides, the answers, though separate, are in substance and effect the same, and all show a *joint interest*, while

the allegations of the complainant are *conclusive* as to *non-separability* of the interests of the defendants.

"A defendant can not make an action several which plaintiff elects to make joint." (Little *v.* Giles, 118 U. S., 596.)

"For the purpose of determining whether a separate controversy exists on petition for removal the allegations of the bill must be taken as confessed." (East Tennessee V. and G. R. Co. *v.* Grayson, 119 U. S., 240.)

In Mitchell *v.* Smale (140 U. S., 409), this court, opinion by Mr. Justice Bradley, said:

"The plaintiff was alleged to be a citizen of Illinois and the defendant, Jordan, a citizen of New York. The citizenship of the other defendants was not mentioned, though it is understood they were residents of Illinois. It is clear, therefore, that the case was not removable unless the interest of Jordan was so separate and distinct from that of the other defendants that it could be fully determined as between him and the plaintiff without the presence of the other parties in the cause. * * * We *have held that a defendant can not make an action several which the plaintiff elects to make joint.*" (Little *v.* Giles, 118 U. S., 569.)

This court, *in re* Pa. Co., 137 U. S., opinion by Mr. Justice Bradley, in construing the act of 1887 as corrected by the act of August 13, 1888, and in holding that those acts deprived this court of the power to issue a mandamus to the judges of a U. S. Circuit Court directing them to reinstate, take jurisdiction of, and try a suit which had been ordered remanded to a State court, said:

"The general object of the act is to contract the jurisdiction of the Federal courts."

Point VIII.

Tenth Assignment of Error.

Should it be held, on a construction of clause 4, section 2, of the removal act of March, 1887, that it was the intention of Congress, by such clause, to provide for the removal of a cause in which the plaintiff and some of the defendants are citizens of the State in which the suit is brought, and other of the defendants citizens of another State or States, the interests of all the defendants being *joint* and *not divisible*, all the defendants being *necessary parties to the suit*, the *whole suit* as to all the defendants, to be removed on application of the defendants who are citizens of a State other than that in which the suit is brought, then we respectfully submit such clause is unconstitutional, and hence we claim that, under the Constitution, the Federal court had no jurisdiction to try the controversy between plaintiff, a citizen of the State of Oregon, and the defendants, Thomas S. Martin, Edward Martin, and John D. Wilcox, also citizens of Oregon.

In support of this proposition, in connection with a few additional observations, we cite the court to the very able argument of Messrs. Hoar and Soulé, reported in the case of the Sewing Machine Companies, 18 Wallace, 567. This court decided in that case that Congress had not authorized the removal where there were citizens of the same State on both sides of a suit, and, therefore, did not pass upon the constitutional question so ably argued in that case.

Applying the doctrine of this court so often enunciated and so ably stated by the late Justice Miller without dissent in so recent a case as Smith *v.* Lyon, *supra*, and wherein the authorities supporting it were so carefully collated, as to the proper construction of the clause in the judiciary act of 1789 and other similar clauses in the

various acts since, including those in section 1 of the act of March 3, 1887, to the constitutional clause "*controversies between citizens of different States,*" it seems to us it is impossible to hold otherwise than that the constitutional provision means controversies *exclusively* between citizens of different States. If the construction placed on the various statutory clauses quoted (*supra*) requires that in all suits or controversies referred to in such statutes, in which there are more than one person on each side of such suit or controversy, each plaintiff must be competent to sue and each co-defendant must be liable to be sued, is correct, as it unquestionably is, then why should not the same construction be placed on phraseology almost identical and meaning precisely the same thing in the Constitution, namely, "*controversies between citizens of different States?*"

If, then, this constitutional provision following this construction is to be held as referring to and including *only* such controversies as are *exclusively* between citizens of different States, then it is clear Congress has not the right by virtue of the grant of incidental powers or otherwise to confer jurisdiction on a Federal court of a controversy between citizens of the *same* State, although there may be involved in the same controversy citizens of different States.

Can it be successfully maintained, in view of the decisions referred to, that Congress has not, in so far as this *particular question is concerned*, exhausted the power vested by the Constitution? To conclude thus it is absolutely necessary that the constitutional clause "Controversies between citizens of different States" means, not only something different in this particular respect, but something and *much more* than the clauses "*suit* * * * between a citizen of the State where the suit is brought and a citizen of another State," in judiciary act of 1789; "*suit* * * * by a citizen of the State

in which the suit is brought against a citizen of another State," act of July 27, 1866; "*suit* * * * in which there is *controversy* between a citizen of the State in which the suit is brought and a citizen of another State, * * *" act March 2, 1867; "*suits* * * * in which there shall be a *controversy* between citizens of different States," act March 3, 1875; "*suits* * * * in which there shall be a *controversy* between citizens of different States, * * *" section 1, act March 3, 1887. Of course, in some respects the above clauses, or some of them, are restrictive in conferring jurisdiction of what they constitutionally might have been, but our contention is that in the *one respect* the powers conferred are as broad as and coextensive with the power reposed by the constitutional grant. That is to say, "*controversies*" and "*suits*," and "*suits* * * * in which there is controversy," and "*suits* * * * in which there shall be a *controversy*," mean one and the same thing, and that the statutory clauses in this *one respect* expresses all the power expressed by the constitutional provision.

Sewing Machine Cases, 18 Wall., 553.

Our contention, therefore, is that a "*controversy*," or "*controversies*," to come within the scope of the constitutional provision, must be, either where *all* the parties to one side of the "*controversy*" or "*controversies*" are citizens of a State or States other than that of which the parties to the other side of the "*controversy*" or "*controversies*" are citizens, or otherwise the suit, at most, must be one, in which such "*controversy*" or "*controversies*" are involved, of a separable character, where the interests are not *joint*, and so that the interests when suit is commenced originally in or removed to the Circuit Court, may be severed, remitting the controversies, if any, between citizens of the *same* State to the State courts of such State.

While it is true the jurisdiction of the circuit courts

of the United States must in every case depend upon some act of Congress, as they do not derive their judicial power directly from the Constitution, yet, while this is so, it must be conceded that all powers conferred on these courts by any act of Congress must necessarily, to be valid, fall within the scope of the powers delegated by the Constitution. This scope of delegated power, in so far as it relates to the subject under consideration, is clearly defined in the clause of the Constitution, article 3, section 2, which provides that "the judicial power shall extend * * * to *controversies* * * * *between citizens of different States.*"

Unless, therefore, there is some element in a suit other than that of diverse citizenship as to some of the parties to the suit that will confer jurisdiction, it is manifest, as it seems to us, that no act of Congress can confer jurisdiction on any circuit court of a suit or controversy between citizens of the same State.

As well might it be said, as it seems to us, that Congress or the judiciary could, in defining the jurisdiction of the circuit courts, the former by act, the latter by construction, add to the constitutional grant, "all cases affecting ambassadors, other public ministers, and consuls," the words, "all cases affecting governors of the several States;" or, "all cases affecting members of Congress;" or, "all cases affecting judges of the Federal courts."

If Congress may, with the sanction of the judiciary, rightfully clothe circuit courts with jurisdiction over suits or controversies between citizens of the *same* State, and compel the trial of such suits or controversies in the Federal court solely on the ground that one of the defendants is a citizen of another State, then we respectfully submit, with the same reason may Congress do all these things.

We do not understand, of course, that it is claimed by counsel that Congress could, constitutionally, confer juris-

diction on a circuit court of a controversy between citizens of the same State, in a case where *all* the parties to such controversy are citizens of such State, and in which suit there is involved no subject-matter which, under the Constitution, would of itself give jurisdiction, irrespective of the citizenship of the parties, but rather that the claim is that, under the incidental powers of the Constitution, Congress may come to the aid of any citizen of any State who may be involved in a controversy with any citizen or citizens of another State, by giving him a hearing in a circuit court, regardless of the question as to how many other citizens on the same side of the controversy with him may be citizens of the same State as that of citizens on the other side of such controversy, and this although the interests of all the defendants may be joint and not separable.

We submit that the right of citizens of the same State to have their suits and controversies tried by their State courts is one in no sense inferior, either in character or importance, to that of citizens of different States to have their suits and controversies adjudicated by the Federal courts, and there can be no good reason, as it seems to us, for holding, in the absence of a clear express grant of power, and simply by construction, in virtue of an implied incidental power, or more accurately, under the *express* grant of *incidental* powers, that the former should be compelled to surrender their right and be forced into a foreign jurisdiction, solely for the reason that the latter may enjoy a right conceded to him in all cases where he is a party to a controversy between himself and a citizen of another State, and which does not involve citizens of the same State, but which, to say the least, is an extremely doubtful right, when citizens of the same State are involved and the *interests* are *joint* and *not separable*. The powers reserved to the States respectively and to the people, are no less sacred, it is

submitted, than are those delegated by the Constitution, and in the absence of an *express* grant great care should be exercised by courts in defining the *incidental* powers, especially when the effect may be, as in the case under consideration, to deprive a citizen of a right of which Congress could not deprive him by virtue of any *express* grant in the Constitution. If the construction placed on this constitutional provision by the court below is the correct one, then not only *one* but a *dozen* defendants in a suit in a State court who are citizens of the same State as that of the plaintiff, and also of the State in which the suit is brought, and also *one* or a *dozen* plaintiffs in the same suit, may *all* be compelled, on motion of a single non-resident defendant, citizen of another State, to forego their right to a trial of their suits and controversies in the courts of their State, and follow the *one* defendant into a Federal court, although the suit may be on a contract that is *joint* between the plaintiffs and *all the defendants*, and the interests of all the defendants, therefore, *joint* and not *separable*. While the absurd and unjust consequences to which a certain construction may lead are not in and of themselves always a reason for withholding such construction, yet we suggest that a construction of the constitutional clause in question, which will lead up to such an absurdity as, well as such an injustice as we have suggested, should not be indulged in, unless, indeed, no other construction fraught with more reason and less injustice is permissible, in view of the phraseology and great purposes of the fundamental law.

The learned court below in discussing this question (Record, 88) says:

"To confine the operation of the words 'controversies between citizens of different States' to cases wherein the controversy is exclusively between citizens of different States, is to interpolate a word into the grant of judicial

power which materially limits and restrains its operation."

This was the precise argument made by the learned counsel, Messrs. Abbot, Curtiss & Merwine, for the plaintiffs in error, in the case of the Sewing Machine Companies, 18 Wall., 553, and which was so ably, and, as we believe, successfully answered by Messrs. Hoar & Soulé, the attorneys for the appellee in that case.

Point IX.

Eleventh Assignment of Error.

Our eleventh assignment of error is that the court erred in overruling our motion for a new trial, and in rendering judgment against the plaintiff for costs and disbursements. In support of this assignment we refer to the preceding arguments; nothing more is deemed necessary. In conclusion, we respectfully submit that for the several reasons herein presented, the court below was without jurisdiction, either as to parties or subject-matter, and, therefore, the judgment of said court should be reversed, with directions to remand the cause to the State court for such further proceedings as may in that court be proper.

Geo. H. Williams,
Geo. H. Durham,
John H. Mitchell,
Attorneys for Plaintiff in Error.

JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1891.

JAMES H. FISK, Plaintiff in Error,

vs.

D. V. B. HENARIE, ELEANOR MARTIN, JAMES M. DONAHUE, ANNIE DONAHUE and MARY ELLEN VON SCHROEDER, Executors of the last will and testament of PETER DONAHUE, deceased; THOMAS S. MARTIN, EDWARD MARTIN and JOHN D. WILCOX, Defendants in Error. } No. 118.

Brief and Argument for Defendants in Error.

J. N. DOLPH,
of Counsel for Defendants in Error.

W. H. MOORE & Co., Prs., 511 Eleventh St. N. W.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1891.

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D. V. B. HENARIE, ELEANOR MARTIN, JAMES M. DONAHUE, ANNIE DONAHUE and MARY ELLEN VON SCHROEDER, Executors of the last will and testament of PETER DONAHUE, deceased; THOMAS S. MARTIN, EDWARD MARTIN and JOHN D. WILCOX, Defendants in Error. } No. 118.

In Error to the Circuit Court of the United States for the District of Oregon.

BRIEF AND ARGUMENT FOR DEFENDANTS IN ERROR.

STATEMENT.

This action was commenced in the circuit court of the State of Oregon for Wasco county on November 30, 1883, against D. V. B. Henarie, Peter Donahue, Eleanor Martin, Thomas S. Martin, Edward Martin and John D. Wilcox, to recover a commission of ten per centum, amounting to $60,000, on an alleged sale of a tract of land, situated in said State, belonging to the defendants, known as the Dalles Military Road grant. The defendants, Henarie, Peter Donahue and Eleanor Martin, were then citizens of Cali-

fornia and the other defendants were citizens of Oregon. (See record, folio 9.) Personal service of summons was had on the Oregon defendants, who appeared and answered. Afterwards and on February 2, 1884, an attachment having been issued in the action and levied on the said lands, service of summons upon the California defendants, by publication, was ordered, and publication had, and on August 21, 1884, they appeared and answered. (See record, folios 36 to 39.) On September 1, 1884, the cause being at issue, upon the application of the defendants, the place of trial was changed to Multnomah county in said State, the place of residence of the plaintiff and of the Oregon defendants. (See record, folio 73.) The case was tried in the circuit court for Multnomah county with a jury, who, on April 15, 1885, found a verdict, under the direction of the court, for the defendants. (See record, folio 77, p. 32.) A judgment was rendered upon the verdict in favor of the defendants for costs, which judgment was, on January 11, 1886, reversed by the supreme court of Oregon, and the cause remanded to the circuit court for further proceedings. (See record, folios 125 to 127.) On May 18, 1886, the death of the defendant, Peter Donahue, was suggested, and his executors, James M. Donahue, Annie Donahue and Mary Ellen Von Schroeder were substituted as defendants, and a second trial resulted on May 22, 1886, in a verdict for the plaintiff for $60,000. Afterwards the cause was heard, on a motion of the plaintiff, for judgment on the verdict and on a motions of the defendants for a new trial and for judgment notwithstanding the verdict; and on June 30, 1886, the motion of the defendants for judgment, notwithstanding the verdict was allowed, and judgment for costs entered in their favor. (See record, folio 152,) which judgment was reversed by the supreme court of Oregon on the 20th of October of that year and the cause

remanded for further proceedings according to law. (See record, folios 162 and 163.) On December 18, 1886, the court allowed the motion of the defendants for a new trial and set aside the verdict. (See record, folio 165,) from which order the plaintiff appealed to the supreme court, which appeal was on April 18, 1886, dismissed. (See record, folio 174.) The cause was thereupon brought on for trial in said circuit court, and submitted to a jury who disagreed, and were discharged on July 15, 1887, without finding a verdict. (See record, folio 182.) Thereupon, and on July 30, 1887, the defendants, D. V. B. Henarie, Eleanor Martin, James M. Donahue, Annie Donahue and Mary Von Schroeder, the executors of the last will of Peter Donahue, deceased, filed their petition, together with their bond, and the affidavits of the defendants, Henarie and Eleanor Martin, for the removal of the cause to the Circuit Court of the United States for the district of Oregon. The following are copies of the petition and affidavits for removal:

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR MULTNOMAH COUNTY.

J. H. FISK, Plaintiff,
vs.
D. V. B. HENARIE, PETER DONAHUE, ELEANOR MARTIN, THOS. S. MARTIN, EDWARD MARTIN, and JOHN D. WILCOX, Defendants.

"To the Hon. E. D. SHATTUCK, judge of the circuit court of the State of Oregon for Multnomah county:

"Your petitioners, D. V. B. Henarie, Eleanor Martin, and James M. Donahue, Annie Donahue, and Mary Ellen Von Schroeder, the executors of the last will and testa-

ment of Peter Donahue, deceased, respectfully show that they are now and at all times since, the commencement of the above-entitled action have been citizens and residents of the State of California, residing in San Francisco, therein, and that the plaintiff, James H. Fisk, is now and at all times since the commencement of said action has been a citizen and resident of the State of Oregon, residing in Portland therein.

"Your petitioner further shows that there is and was at the time said action was commenced a controversy therein between the plaintiff aforesaid and these petitioners as defendants.

"That the amount involved in said action is sixty thousand dollars, exclusive of interest and costs.

"That said action is brought to recover said sum of sixty thousand dollars from these defendants, plaintiff claiming therein that *on* or about the month of December, 1880, the plaintiff and said D. V. B. Henarie and Eleanor Martin as guardians of James V. Martin, Peter D. Martin, Genevive Martin, Walter S. Martin, and Andrew D. Martin, minors, and Thomas S. Martin, Edward Martin, and John D. Wilcox, trustee, for themselves agreed that if plaintiff would procure a purchaser of 600,000 acres of land they owned in Oregon at $1 per acre they would pay him ten per cent. thereof as compensation, and that pursuant to said contract plaintiff procured a purchaser on October 4, 1881, who entered into a written agreement to buy the same, and that thereafter the interest in said lands belonging to said minors was sold and conveyed to the defendant, Peter Donahue, the plaintiff further alleging therein that no payment has been made him on said ten per cent. commission, and sixty thousand dollars is due and owing to him thereon; that defendants have answered denying said or any indebtedness.

"And your petitioner shows that said action was commenced on November 13, 1883; that said defendant, Donahue, died in 1885 in the county of San Francisco, State of California, and your petitioners, James M. Donahue, Annie Donahue, and Mary Ellen Von Schroeder, are the duly appointed and acting executors of his last will and testament, which was duly admitted to probate in said county of San Francisco, and they were, on May 16, 1886,

by stipulation of the parties to said action, duly substituted as defendants therein in the place and stead of their testator.

"That said action has not been tried and is now pending in the above-entitled court.

"THAT FROM PREJUDICE AND LOCAL INFLUENCE YOUR PETITIONERS WILL NOT BE ABLE TO OBTAIN JUSTICE IN THIS COURT OR IN ANY OTHER STATE COURT TO WHICH THE SAID DEFENDANTS MAY UNDER THE LAWS OF THIS STATE REMOVE SAID CAUSE.

"That the other defendants in said action, Thos. S. Martin, Edward Martin, and John D. Wilcox, now and at all times since the commencement of said action have been citizens and residents of the State of Oregon, residing in Portland therein; that your petitioners desire to remove said cause to the circuit court of the United States for the district of Oregon under the provisions of the act of Congress approved March 3, 1887.

"Your petitioners further say that they have filed the affidavit required by the statute in such cases, and they herewith offer their bond, with surety, in the penal sum of one thousand dollars, conditioned as by the statutes of the United States required.

"Your petitioner therefore prays that said bond may be accepted and approved, and that said cause may be removed into the next circuit court of the United States for the district of Oregon, and that no further proceedings may be had therein in this court.

"And your petitioners will ever pray.

"JAMES K. KELLY and
"GEARIN & GILBERT,
"*Attorneys for Petitioners.*"

STATE OF CALIFORNIA, }
City and County of San Francisco. } ss:

"I, D. V. B. Henarie, being first duly sworn, say that I am one of the petitioners above named, and that the foregoing petition is true, as I verily believe.

"D. V. B. HENARIE."

"Subscribed and sworn to before me this 25th day of July, 1877.

[SEAL.] "EUGENE W. LEVY,"
"*Commissioner of Deeds for the*
"*State of Oregon in California.*"

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR MULTNOMAH COUNTY.

J. H. FISK, Plaintiff,
vs.
D. V. B. HENARIE, PETER DONAHUE, ELEANOR MARTIN, THOS. S. MARTIN, EDWARD MARTIN, and JOHN D. WILCOX, Defendants.

STATE OF CALIFORNIA, } ss:
City and County of San Francisco, }

"I, D. V. B. Henarie, and I, Eleanor Martin, being each duly sworn, each for himself and herself, say that I am one of the defendants in the above-entitled action; that I have reason to believe and do believe AND I SO STATE that from prejudice and local influence the defendants in said cause, to wit, we, the affiants, and James M. Donahue, Annie Donahue, and Mary Ellen Von Schroeder, executors of the last will and testament of Peter Donahue, deceased, will not be able to obtain justice in said State court or in any other State court to which said defendants, under the laws of the State of Oregon have the right to remove the same on account of such prejudice and local influence.

"D. V. B. HENARIE,
"ELEANOR MARTIN."

August 1, 1877, said court made and entered of record an order declaring the affidavit, petition and bond to be in due form, approving the bond and ordering that the

State court proceed no further in the cause and that the same be removed to the Circuit Court of the United States for the district of Oregon. (See record, folio 200.) Duly certified copies of the pleadings, papers and record entries in the case including the petition, affidavits and bond for removal were filed in the office of the clerk of the Circuit Court of the United States for the district of Oregon on the 30th day of September, 1887. October 8, 1887, the plaintiff, by his attorneys, filed a motion to remand the cause to the State circuit court upon the following grounds:

"1. Because, said application for the removal of said cause was not made in time or before trial of said cause in said State court.

"2. Because, the petition and affidavit for the removal of said cause upon the grounds of local influence or prejudice are insufficient in that they do not set forth the facts or reasons showing said alleged prejudice or local influence.

"3. That the rules of practice in said State court provide that copies of all papers filed in any cause pending in said court shall be served upon the adverse party, and that in the absence of such service such papers so filed shall be disregarded; that no service of the said papers for said removal were served upon plaintiff or his counsel, nor does the record show any service thereof.

"4. Because, said petition and accompanying papers filed for the purpose of removing said cause do not show a proper case for removal."

Said motion contains the following denial and application:

"And plaintiff hereby denies the existence of any prejudice or local influence which would prevent said defendants or any of them from obtaining justice in said State court or at all; and plaintiff hereby applies to this court to examine into the truth of said affidavits alleging said prejudice and local influence and the grounds thereof, and thereupon to direct that said action be remanded to the court whence it was removed. This motion is based upon the record and the affidavits herewith filed in support of this motion."

On motion of counsel for plaintiff, the motion to remand was set for a hearing, was heard, and on October 26, 1887, was denied. (See record, folios 204 to 209.) Thereupon and on November 22, 1887, upon motion of plaintiff's counsel, the cause was set for trial on December 15, 1887. The trial was commenced at the time fixed and resulted in a verdict, rendered December 19, for the defendants. In answer to a question submitted to them for a special finding, which was in substance whether plaintiff was to receive a commission upon the contract price upon making a sale, or upon the money and bonds, forming the consideration for the land when received by the defendants, they made the following finding:

"We, the jury, in answer to the foregoing question, find that the commissions to be paid fixed on the sale to Leigh, Payne & Company, became due and payable when the land is sold, and the money paid." (See record, folios 224 and 225.)

On the 19th of the same month a judgment was rendered in favor of the defendants for cost and disbursements. (See record, folios 217 to 229.) Thereupon and on January 28, 1888, the plaintiff, by his counsel, filed a motion for a new trial upon the following grounds:

"1. The court has no jurisdiction of the parties or of the subject-matter of said action.

"2. For error of the court in denying plaintiff's motion to remand the said cause to the circuit court of the State from which the same was removed.

"3. The error of the court in submitting to the jury the question of whether or not there was a modification of the contract for the payment of commissions, out of which this action arose."

The motion was heard, upon the single ground that the court erred in refusing to remand the cause to the State court, "*the other grounds of the motion being expressly*

waived" and on June 11, 1888, the motion was denied. (See record, folios 240 to 242.)

Thereupon the plaintiff brought the case by writ of error to this court.

The questions sought to be raised by the plaintiff in error for consideration in this court arise under the clause of the second section of the act of March 3, 1887, concerning removal of suits from State to Federal courts on the ground of prejudice or local influence. This provision has given rise to a wide difference of opinion among the judges of the several circuit courts, and the decisions are not reconcilable. The decision of Judge Deady in this case was one of the earlier, if not the first one, rendered, in which the clause in question received judicial construction. The question as to the amount in controversy required to entitle a defendant to remove a suit under this clause was passed upon by this court in *In re* Pennsylvania Company, petitioner, 137 U. S. Report, 451. But the other questions which have arisen under it, and which arise in this case, I think may fairly be treated as now for the first time before this court for decision. The conflict between the decisions of the Federal courts concerning this clause are not confined to the question as to whether so much of section 639 of the Revised Statutes as relates to the method of removal on account of prejudice or local influence and the proof thereof is or is not repealed by the act of 1887, but extends to the questions whether a defendant who is a non-resident of the State in which a suit is brought can remove it from a State to a Federal court when there are resident defendants, the plaintiff being also a resident of such State, the question as to the court in which the application should be made, the form and sufficiency of the application, the time within which it may be made, and as to whether the case made by a

defendant upon an application for removal can be controverted by the plaintiff.

There was no assignment of errors made, attached to, and returned with the writ of error in this case, as required by section 997 of the revised statutes.

Judge Deady, in his opinion upon the motion to remand, held that:

"The provision in § 2 of the act of 1887 (24 Stat., 553) authorizing the court to examine into the truth of an affidavit for removal of a case from a State court on account of prejudice or local influence applies only to cases removed before the passage of said act on the application of the plaintiff; and otherwise than this such affidavit, being not a matter of jurisdiction, but only a condition imposed on the party seeking the removal, it cannot be questioned or contradicted, nor is it necessary that the affiant should state the grounds of his belief;" that

"Subsection 3 of § 639 of the R. S., as amended by § 2 of the act of 1887, gives the right to remove a suit 'in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State' to 'any' defendant, being such citizen of another State, on account of prejudice or local influence, without reference to the citizenship of other persons who may be parties thereto; that

"The judicial power of the United States extends to 'controversies' between citizens of different States, which include a 'case' in which such controversy exists without reference to the citizenship of the other parties therein, and Congress may confer jurisdiction of such controversy, including the case in which it is involved, on the circuit courts, by removal or otherwise;" and that

"An application for the removal of a case from a State court, if made while the case is pending for trial, is made 'before the trial thereof,' within the intent of the removal acts, although there may have been any number of mistrials or trials in which the verdict was set aside or the jury disagreed."

The question before this court is not whether any or all of these propositions are good law, but whether the action of the court below in refusing to remand the cause to the State court and proceeding with it upon the showing made by the defendants, in view of the proceedings as disclosed by the record, was or was not erroneous.

The specification of errors in plaintiff's brief is as follows:

ASSIGNMENT OF ERRORS.

"The court below erred in denying the plaintiff's motion (Record, p. 73) to remand this cause to the State court for the following reasons:

"1st. Because the application for removal from the State to the Federal court was not made before trial in the State court, and therefore not in time under the Removal Act of March 3, 1887.

"2d. Because, the transcript from the State court did not give the United States Circuit Court jurisdiction of the case or furnish any legal evidence to said court.

"3d. Because, the application for removal, instead of being made to the Circuit Court of the United States, as required by said act, was made to the State court.

"4th. Because, the petition and affidavit of defendants (Record, pp. 72, 73, and 74) for removal upon the grounds of prejudice and local influence are insufficient in this, that they do not state positively, but on belief, the existence of such prejudice and local influence as would prevent them from obtaining justice in the State courts, nor do they set forth any facts or reasons showing the existence of the alleged prejudice and local influence or reasons for the belief of the petitioners in their existence.

"5th. Said court erred in refusing to examine into the truth of the petition and affidavit for removal, alleging the existence of prejudice and local influence, and in refusing to allow the plaintiff to make any showing upon the subject as proffered by him, he having in his motion to remand denied in the court below positively the existence of any such prejudice or local influence.

"6th. The court erred in holding that subsection 3 of

section 639 of the Revised Statutes was not repealed by the act of March 3, 1887, relating to the removal of causes from State to Federal courts, and in holding that so much of section 639 of the Revised Statutes as relates to the *method of removal* on account of prejudice or local influence, and the proof thereof, is not in conflict with the act of 1887, and is, therefore, still in force and applicable to such removal. (Record, 85.)

"7th. The court erred in holding, as stated in the opinion (Record, 89) that 'this cause was removed under subsection 3 of section 639 of the Revised Statutes, which section requires the application for removal to be made *before the trial or final hearing of the suit.*'

"8th. The court erred in not remanding the cause for the reason that there never had been any adjudication by the said Circuit Court of the United States or any record thereof made that it had been at any time or in any manner made to appear to said court in such suit that there existed such prejudice or local influence as would prevent defendants from obtaining justice in the State courts, and because there never had been any adjudication or any order of such court or any record thereof directing the removal of said suit to the Circuit Court.

"9th. The court erred in holding that it was the intention of Congress, as expressed in the removal act of 1887, to provide for the removal of a 'suit' on the application of a defendant or of defendants, citizens of a State other than that of which the plaintiff is a citizen, and where there are one or more defendants citizens of the same State of which the plaintiff is a citizen, and in which suit the interests of the defendants are joint and not separable.

"10th. The court erred in holding that Congress has the power, under the Constitution, to provide for the removal of a suit from a State to a national court in which some of the necessary parties defendant are citizens of the same State with the party plaintiff, and in failing to hold that the act of March 3, 1887, in the event it should be held as expressing such power, is unconstitutional.

11th. Said court erred in denying plaintiff's motion for a new trial for reasons stated in the foregoing assignment of errors, and in rendering judgment against the plaintiff in the court below for costs and disbursements."

I shall not consider these alleged errors in the order stated. If the court shall hold that the specification of errors for the first time in the brief of counsel is sufficient, all the questions raised for consideration may be condensed and conveniently stated and considered in the manner and order following:

FIRST. Was the application for the removal of this cause from the State to the Federal court made in time?

SECOND. Under the act of March 3, 1887, does the right of removal for local prejudice and influence exist where the suit is between a citizen of a State in which it is brought, on the one side, and a citizen of the same State, and a citizen of another State, on the other side?

THIRD. Were the petition, affidavits and papers before the United States Circuit Court when the motion to remand this cause was denied taken in connection with the facts of which the court could take judicial knowledge and the status of the case sufficient to sustain the decision and judgment of the court, that the cause should proceed in the Federal court?

FOURTH. Was the plaintiff entitled in the court below to deny the allegation of prejudice and local influence and to controvert the proofs to show its existence submitted by the defendants?

FIFTH. If the plaintiff was entitled to deny the allegation as to prejudice and local influence and to controvert the showing made by the defendants, did he do the things necessary to claim the right in the court below and to bring the question of his right to this court for consideration?

I.

WAS THE APPLICATION FOR THE REMOVAL OF THIS CAUSE FROM THE STATE TO THE FEDERAL COURT MADE IN TIME?

The act of March 2, 1867, authorized the removal of a cause from the State court to a national court when an application was made before final hearing or trial of suit. (14th Stat. at Large, 558). Under this statute an application for removal made before the hearing of a trial of a suit which resulted in a final judgment was commenced was held to be in time. Stevenson *vs.* Williams, (19 U. S. Rep., 572.) Subsections 1 and 2 of section 639 of the Revised Statutes were repealed by the act of 1875. Hyde *vs.* Ruble, (104 U. S., 407); King *vs.* Cornell, (106 U. S., 397 and 398); Holland *vs.* Chambers, (110 U. S., 59); Ayers *vs.* Watson, (113 U. S., 594.) But subsection 3 was not so repealed. Bible Society *vs.* Grove, (101 U. S. 601); Hess *vs.* Reynolds, (113 U. S., 73–80); Balto. & O. R. R. *vs.* Bates, (109, U. S., 467.) Under subsection 3 the petition for removal might be filed at any time before the final trial or hearing. Insurance Company *vs.* Dunn, (19 Wall., 204); Vannever *vs.* Briant, (21 Wall., 41); Yulee *vs.* Voss, (99 U. S., 539, 545); Railroad Company *vs.* McKinley, (99 U. S., 147); Balto. & O. R. R. *vs.* Bates, *supra*. Schræder Min. M. F. G. Co. *vs.* Parker, (129 U. S., 688.) In this case it was held by this court that a petition for removal of a cause from a State court to a Circuit Court of the United States on the ground of diversity of citizenship filed after a judgment therein had been reversed by the Supreme Court of the State and the remand of the case for a new trial is in time. In Hess *vs.* Reynolds, Adm'r, *supra*, it was held that "the act of March 3, 1875, to determine the jurisdiction of the circuit courts and regulate the removal of causes from State courts, does not repeal or supersede all other statutes

on these subjects, but only such as are in conflict with this latter statute. The third clause, section 639 of the Revised Statutes, is not therefore abrogated or repealed; and that an application for removal under that clause is in time if made before the trial or final hearing of the cause in the State court."

By section 3 of the act of March 3d, 1875, it was provided that whenever either party or any one or more of the plaintiffs or defendants entitled to remove any suit mentioned in the next preceeding section shall desire to remove such suit from a State court to a Circuit Court of the United States, he or they may make and file a petition in such suit in such State court, before or at the term at which such cause could be first tried, and before the trial thereof for the removal of such suit into the circuit court.

In Hancock *vs.* Holbrook, (119 U. S. Rep. 586,) it was held that "the act of March 3, 1875, (18 Stat. 471,) provides that petition for removal must be filed at or before the term at which the case could be first tried and before trial. This provision has been construed by this court to mean the first term at which the cause was in law triable—the first term in which the cause would stand for trial if the parties had taken the usual steps as to pleadings and other preparations."

See, also, Babbitt *vs.* Clark, (103 U. S., 606,) Pullman Palace Car Co. *vs.* Speck, (133 U. S. 87.) It was held in Alley *vs.* Nott, (110 U. S. 472,) Scharf *vs* Strong, (112 U. S. 701,) that there could be no removal after hearing on demurrer to a complaint because it does not state facts sufficient to constitute the cause of action. In Alley *vs.* Nott, the removal was on the ground of a citizenship. Chief Justice Waite, in delivering the opinion of the court, said:

"To allow a removal after such a trial would be to

permit 'a party to experiment on a case in the State court, and if he met with unexpected difficulties, stop the proceedings and take the suit to another tribunal.' This, as was said in the removal cases, (100 U. S. 473,) could not have been the intention of Congress."

In Hess *vs.* Reynolds, *supra*, it was suggested as a reason why removals on account of local prejudice should be allowed to non-residents at any time before the final trial that "the hostile local influence may not be known or developed at an earlier stage of the proceedings." The non-resident defendant, entitled under the act of 1887 to remove a cause from a State to a Federal court on account of prejudice and local influence, will presumably be a stranger, ignorant of local affairs, and as to whether prejudice or local influence exists. Could it have been the intention of Congress by the act of 1887 to limit the right of defendant to remove a cause for local influence as to the time in which the suit might be removed?

JUDGE DEADY, in his opinion on the motion to remand this case, discussing this question, said:

"Under the act of 1866 (14 Stat., 356) the application for removal was required to be made 'before the trial or final hearing.' In the act of 1867 the language was changed to 'final hearing or trial.' Section 639 of the Revised Statutes, which contains a compilation of these two acts, went back to the language of the act of 1866—'before the trial or final hearing of the suit.' The act of 1875 required the application to be made 'before or at the term at which said cause could be first tried and before a trial thereof.'

* * * * * *

"The following are the principal cases arising under these acts on the question of the time of removal:"

"Dart *vs.* McKenney (9 Blach., 359) was a case of removal under the act of 1866. A judgment was given in the State court on the report of a referee against the defendants which was reversed and a new trial granted;

whereupon one of the defendants removed the cause, and on a motion to remand it was held that the act gave the right of removal 'at any time before the trial or final hearing of the cause.'"

"Insurance Co. *vs.* Dunn (19 Wall., 214) was removed under the act of 1867. The case was first tried in a court of the State of Ohio where there was a verdict against the company. The law of the State gave the latter a right to a new trial on giving bond to abide and perform the judgment of the court, which it did, and then removed the case to the circuit court.

"In the progress of the same it was taken to the Supreme Court on the question of whether the removal was taken in time, where it was decided in the affirmative. It was held that the adjective 'final' applied to 'trial' as well as 'hearing,' it being understood before the former, and some weight was given to this circumstance. The conclusion of the court was this: 'It was intended to permit the removal at any time before a hearing or trial final in the cause as it stood when the application for the transfer was made.'" See also Stevenson *vs.* Williams, 19 Wall., 575.

"In Vannever *vs.* Bryant (21 Wall., 41) there was an application for removal under the act of 1876. The case was this: A trial and verdict was had in the State court. The defendants moved for a new trial, and pending this motion the non-resident defendants applied for a removal, which was refused, and on this ruling the case went to the Supreme Court. The ruling was affirmed on the authority of the Sewing Machine Cases, 18 Wall., 553. In delivering the opinion of the court the Chief Justice also said that the application was also properly refused because the case was not then pending for trial, and added: 'After one trial the right to a second must be perfected before a demand for the transfer can be properly made. Every trial of a cause is final until, in some form, it has been vacated.

"Jifkins *vs.* Sweetzer (102 U. S., 177) was removed under the act of 1866, and afterwards remanded to the State court. From the order remanding the case an appeal was taken to the Supreme Court, where the same was affirmed.

"This was a suit for an account of rents and profits in

which there was a decree in the common pleas dismissing the bill. On an appeal to the supreme court of the State this decree was reversed, the bill reinstated, and the common pleas instructed to refer the case to a master to take an account for the purpose of making 'a final decree in the premises according to equity.' Two years after the reference, but before any report was filed, the defendant applied to have the case removed to the circuit court.

"The Supreme Court held that the hearing in the State supreme court was a final one, and that nothing remained to be done but to continue the same 'until the necessary accounts could be taken and the details of a final decree settled,' and therefore the application was too late. In the course of the opinion Mr. Justice Miller said the hearing of the case was taken up by the Supreme Court on the appeal from the common pleas. 'If on the appeal below had been reversed and the cause sent back for a rehearing, then the final hearing for the purposes of the statute now under consideration would not have begun until the court below had again entered upon the determination of the cause.'"

"Alley *vs.* Nott (111 U. S., 472) was commenced in a State court of New York and removed on the petition of Alley, one of the defendants, under the act of 1875, to the circuit court, where a motion to remand was allowed. From this ruling an appeal was taken to the supreme court, where the decisions of the circuit court was affirmed on the ground that the application for the removal came too late.

"The case was this: Alley and other defendants demurred to the complaint in the State court because it did not state facts sufficient to constitute a cause of action, which demurrers were overruled, with leave to the defendants to withdraw their demurrers and answer within a time prescribed, which was done, and on the day following the petition for removal was filed.

"The question argued before and decided by the court is that the trial of an issue of law, such as arises on a demurrer to a complaint for the cause specified, is 'a trial of the action within the meaning of the act of 1875.' In the course of his opinion the Chief Justice remarked that 'the

State court, before entering a final judgment on the demurrer, granted a new trial with leave to amend the pleadings;' and then said, *arguendo:* 'The situation of the case at this time, for the purpose of removal, was precisely the same as it would be if the trial, instead of being on an issue of law involving the merits, had been on an issue of fact to the jury, and the court had, in its discretion, allowed a new trial after verdict. We can hardly believe it would be claimed that a removal could be had in the last case, and, in our opinion, it cannot in the first.'

"Baltimore & Ohio R'y *vs.* Bates (119 U. S., 464) was an action brought in a court of common pleas in Ohio against the railway company. A general demurrer to the petition was sustained by the court and judgment given for the defendant. Afterwards this judgment was reversed by the district court and the case remanded to the common pleas for further proceedings. There the defendant filed a petition for removal under subsection 3 of § 639 of the Revised Statutes, on the ground of prejudice and local influence, and offered security such as is prescribed by said section, rather than the act of 1875. For this reason the petition was denied and the case went up the long ladder of appeals, with varying fortune, until it reached the supreme court of the State, where the refusal to allow the removal was affirmed. From there the case was taken to the Supreme Court, where the judgment of the State court was reversed.

"The argument of counsel for Bates appears to have been principally devoted to the sufficiency of the security, and the court held that it was properly given under § 639 of the Revised Statutes; but the question of whether the petition was filed in time was also presented and decided. The Chief Justice disposed of it as a matter scarcely open to argument in these words: 'This petition was filed after a new trial had actually been granted and while the cause was pending in the trial court for that purpose. It was, therefore, in time, and no objection is made to its form.'

"This is the latest case in the Supreme Court on this question to which my attention has been attracted. It expressly decides that, under subsection 3 of § 639 of the

Revised Statutes, while a cause is pending for trial in the State court a petition for its removal is in time, without reference to the number of trials or mistrials that may have been had in it before.

"The suggestion of the learned Chief Justice to the contrary, in Alley *vs.* Nott, *supra*, on which the plaintiff seems to rely, must yield to this direct decision of the court announced by himself.

"There is no other authority that gives any countenance to the proposition that the phrase 'before the trial,' as used in any of these removal acts, means any proceeding other than that which results in a verdict of judgment, subsisting and in force when the application is made. Where the word 'trial' is qualified by the word 'final,' as in the act of 1867, this conclusion is inevitable; but even in the acts of 1886 and 1875 and § 639 of the Revised Statutes, where the phrase used is simply 'before the trial,' the language fairly construed means, as Mr. Justice Blatchford said in Dart *vs.* McKinney, *supra*, 'the trial of the case, and not the trial of it.' In the nature of things the trial of the case is not any one, but the final one—the one that stands as a thing accomplished in the case.

"Where a jury is discharged without a verdict the proceeding is properly known as a mistrial; and where a verdict is set aside because it ought not to stand, the result is the same. The proceeding has miscarried and the consequence is not a trial but a mistrial.

"And in the case of a removal for prejudice or local influence there is a good reason for giving the non-resident party a right to make the application after a mistrial, for, as was said by Mr. Justice Miller, in Hess *vs.* Reynolds (13 Wall., 80), 'the hostile local influence may not become known or developed at an earlier stage of the proceeding.

"In Spear's Law of the Federal Judiciary (468), after an examination of the cases on the subject, the author says that whenever a verdict is set aside or the jury disagree the weight of authority is that the case is restored to the status it had before any trial took place, and adds: 'The theory on which this view rests is that the first trial, being wholly vacated or resulting in a disagreement of the jury,

was a nullity, and hence the case stands, as to the right of removal, just as it would have stood if no such trial had been had.'"

In Whelan *vs.* New York, L. E. & W. R. Co., (35 Fed. Rep., 849,) Judge Jackson, in delivering the opinion of the court, said:

"It is next claimed for the plaintiff that the application for removal having been made after the suit was heard in the State court on the defendants' demurrer to plaintiff's petition was too late, as the clause under consideration requires that the removal must be sought or may be had 'at any time before the trial thereof.' The suit was still pending when the removal was had, and 'the trial' referred to in this clause should be construed as meaning the final trial. This was the conclusion reached by Judge Deady in the case of Fisk *vs.* Henarie, 32 Fed. Rep., 425–427, after a full and careful review of the authorities, which fully sustain his construction. The case cited and relied on by counsel for plaintiff arose under the second section of the act of 1875, and for the reason suggested by the court in Hess *vs.* Reynolds, 113 U. S., 80, Sup. Ct. Rep., 377, that 'the hostile local influence may not become known or developed at an earlier stage of the proceedings,' removals on account of local prejudice should be allowed the non-resident at any time before the (final) trial."

It is believed that, with a single exception, in all the decisions in cases arising under the act of 1887, in which the question of the time within which a case may be removed was involved, it has been held that the removal was in time if made before a final trial of the cause. The exception was Davis *vs.* Chicago M. W. Ry. Co. (Circuit Court N. D. Iowa, 46 Fed Rep., 307.)

In this call on a motion to remand to State court Judge Shiras held:

"That under the removal act of 1887, as amended in

1888, which provides that a cause may be removed on the ground of local prejudice 'at any time before the trial thereof' an application for removal on the ground of local prejudice comes too late when made after a trial on the merit has been entered upon, though the jury were discharged without agreeing to a verdict."

The learned judge in his opinion says that the decisions in the Circuit Courts are not in accord upon this question, and it cannot be questioned that a strong argument can be made in support of either side of the proposition, and apparently oblivious to the difference between the two classes of cases provided for, after contending that the words in the statute of 1887 "at any time before the trial thereof," are equivalent to the language used in the act of 1875 "before or at the term at which said cause could first be tried and before the trial thereof" under which it was held in this court that the right of removal did not exist where a demurrer had been submitted said:

"While it cannot be denied that there is much force in the reasoning found in the cases which hold the contrary view, yet on the whole to my mind the weight of the argument is with the cases that hold that under the present statute a removal on ground of local prejudice or influence cannot be had after a trial has once been had in the State court, or, in other words, that in this particular the present statute must bear the same construction to that of 1875, and hence that after a trial upon its merits has been actually entered upon in the State court it is too late to seek a removal to the Federal Court upon the ground of local prejudice or influence."

II.

UNDER THE ACT OF MARCH 3, 1887, DOES THE RIGHT OF REMOVAL FOR LOCAL PREJUDICE AND INFLUENCE EXIST WHERE THE SUIT IS BETWEEN A CITIZEN OF A STATE IN

WHICH IT IS BROUGHT, ON THE ONE SIDE, AND A CITIZEN OF THE SAME STATE AND A CITIZEN OF ANOTHER STATE ON THE OTHER SIDE?

This question comes now for the first time before this court for decision. It involves two inquiries:

The first is, whether the statute in terms authorizes the removal of a suit on the ground of prejudice and local influence by defendants who are citizens of a State other than that in which the suit was brought when a controversy exists between a citizen of the State wherein the suit is brought on the one side, and citizens of other States, and of the State in which the suit is brought, on the other side.

The second is, whether if such removal is in terms authorized by the Statute the act is constitutional.

In the County of Yuba *vs.* Pioneer Gold Mining Company, *et al* (Circuit Court N. D. California, 32 Fed. Rep., 183), it was held that:

Under section 1 "of the removal act as amended by the act of March 3, 1887, the circuit court cannot take cognizance of a suit brought against a party in a district of which he is not an inhabitant; and section 2 does not authorize the removal of a suit brought in a State court against a party not an inhabitant of the district." And that:

Section 2 "of said act as amended does not authorize the removal of a suit from a State court to the United States Circuit Court, which could not have been originally brought in said Circuit Court."

In Fales Admr. *vs.* Chicago M. and St. P. Ry. Co. (Circuit Court Northern District of Iowa, 32 Fed. Rep., 673) Judge Shiras held, upon a motion to remand a case to the State court which had been removed to the circuit court, that:

"The provisions of act of Congress of March 3, 1887, § 1, regarding the place of bringing suit by original process in Circuit Courts of the United States do not apply in determining the question of jurisdiction on an application for removal of causes from the State courts."

This decision was followed by a number of decisions of the circuit courts, all of them against the decision in the Yuba County Case, and the latter decision was in Wilson *vs.* The Western Union Telegraph Company, (Circuit Court N. D. California, 34 Fed. Rep., 155). Opinion by Mr. Justice Field overuled.

There are numerous decisions respecting the right of removal of a suit from State to Federal courts on account of prejudice and local influence under the acts of 1867 and 1875, but the act of 1887 has unsettled the law upon that subject. The decisions under this act by the circuit courts have not been entirely in accord upon the question, but the weight of authority is that a non-resident defendant may remove a suit on account of prejudice and local influence, although there are other defendants to the action who are citizens in the State in which the suit is brought. The right of the defendants to remove this cause to the Circuit Court of the United States must be determined upon the provisions of the act of 1887. Material changes were made in the law on this subject by that act. That these changes may be more readily seen the law as it stood prior to the passage of that act, and clause 4 of section 2 of the act of 1887 are submitted in parallel columns.

Act of 1867, subdiv. 3, Sec. 639, R. S.:

THIRD, "WHEN A SUIT IS BETWEEN A CITIZEN OF THE STATE IN WHICH IT IS BROUGHT AND A CITIZEN OF ANOTHER STATE, IT MAY BE SO REMOVED ON THE PETITION OF THE LATTER, WHETHER HE BE PLAINTIFF OR DEFENDANT, FILED AT ANY TIME BEFORE THE TRIAL OR FINAL HEARING OF THE SUIT, IF, BEFORE OR AT THE TIME OF FILING SAID PETITION, HE MAKES AND FILES IN SAID STATE COURT AN AFFIDAVIT STATING THAT HE HAS REASON TO BELIEVE, AND DOES BELIEVE, THAT FROM PREJUDICE OR LOCAL INFLUENCE HE WILL NOT BE ABLE TO OBTAIN JUSTICE IN SUCH STATE COURT."

Act of 1887, Clause 4:

"And when a suit is now pending, or may hereafter be brought in any State court, IN WHICH THERE IS A CONTROVERSY BETWEEN A CITIZEN OF THE STATE IN WHICH THE SUIT IS BROUGHT AND A CITIZEN OF ANOTHER STATE, ANY DEFENDANT, BEING SUCH CITIZEN OF ANOTHER STATE, may remove such suit into the Circuit Court of the United States for the proper district, at any time before the trial thereof, WHEN IT SHALL BE MADE TO APPEAR TO SAID CIRCUIT COURT THAT from prejudice or local influence he will not be able to obtain justice in such State Court, OR IN ANY OTHER STATE COURT to WHICH THE SAID DEFENDANT MAY, UNDER THE LAWS OF THE STATE, HAVE THE RIGHT, ON ACCOUNT OF SUCH PREJUDICE OR LOCAL INFLUENCE, TO REMOVE SAID CAUSE. *PROVIDED*, THAT IF IT FURTHER APPEAR THAT SAID SUIT CAN BE FULLY AND JUSTLY DETERMINED AS TO THE OTHER DEFENDANTS IN THE STATE COURT WITHOUT BEING AFFECTED BY SUCH PREJUDICE OR LOCAL

INFLUENCE, AND THAT NO PARTY TO THE SUIT WILL BE PREJUDICED BY A SEPARATION OF THE PARTIES, SAID CIRCUIT COURT MAY DIRECT THE SUIT TO BE REMANDED SO FAR AS RELATES TO SUCH OTHER DEFENDANTS, TO THE STATE COURT, TO BE PROCEEDED WITH THEREIN."

It will be observed by comparison of these acts that the act of 1867 gave either a *plaintiff* or *defendant* the right of removal, while the act of 1887 *restricts that right to the defendant* AND GREATLY ENLARGES THE RIGHT OF A NON-RESIDENT DEFENDANT TO REMOVE A CAUSE TO THE STATE COURT. The provision of the act of 1867 was as follows:

"When a suit is between a citizen of the State in which it is brought and a citizen of another State it may be so removed on the petition of the latter, whether he be plaintiff or defendant."

It will be observed that this clause made no provision for the removal of anything but the "suit," and the suit must be between a citizen of the State in which it is brought and a citizen of another State.

This provision of the act of 1867 was held to refer to suits in which there was a single controversy between a citizen or citizens of a State in which the suit is brought and a citizen or citizens of another State—to be limited to cases in which all necessary plaintiffs, if more than one, and all necessary defendants, if more than one, were parties. It did not, as is done by clause 4 of the act of 1887, provide for the removal by part of the defendants. Clause 4 of the act of March 3, 1887, *ex industria*, and distinctly

provides for the removal of suit in which no matter how many other controversies may exist, or between whom, there is "a controversy between a citizen of a State in which the suit is brought and a citizen of another State." This contemplates and provides for a case where there may be both non-resident and resident defendants, and authorizes the non-resident defendant to remove the cause in a case on the single and simple condition that the pleadings show that there is a controversy—it may be only one controversy among a dozen—between a citizen of the State in which the suit is brought and a citizen of another State. This clause relates to and contemplates and includes suits with two or more controversies, and makes provision that if any one of such controversies is between a resident plaintiff or resident plaintiffs and non-resident defendant, although there may be resident defendants also, then any defendant, being such "citizen of another State," may remove the suit; any one such defendant may remove the suit. The decisions, therefore, under the act of 1867, that all the necessary and indispensable parties on the one side must be citizens of the State in which the suit is brought, and all the necessary and indispensable parties on the other side must be citizens of some other State, have no application under the fourth clause of the act of 1887, for the distinct provision is not only that a separable controversy entitles to the removal, but that any one of the defendants interested in any suit in controversy with resident plaintiffs may remove it, therefore purposely enlarged the area of removability in the act of 1887 in favor of non-residents. The language of the act of 1887 is as follows:

"And where a suit is now pending, or may hereafter be brought in any United States court in which there is a controversy between a citizen of the State in which the suit is brought, and a citizen of another State, any defendant, being such citizen of another State, may remove such suit into the Circuit Court of the United States."

There is no ambiguity in this language, at least so far as it relates to the question under consideration. If there is a suit pending in the State court in which there is a controversy between a citizen of a State in which the suit is brought and a citizen of another State, any defendant who is a citizen in a State other than that in which the suit isbrought may remove the whole case. If after a case is removed it is made to appear to the court that a separation of the parties, that is of the non-resident defendants removing a cause can be had from the other defendants in the suit "without prejudice," etc., the court may then remand the other defendants to the State court.

The decisions of the Circuit Court of the United States in which the local prejudice provision of the act of 1887, has been considered have, it is believed, with the single exception of the decision of Judge Shiras, in Anderson et al *vs.* Bowers et al, 43 Fed. Rep 321, been to the effect that Congress intended to confer on any defendant to a suit pending in a State court who is a citizen of another State than the one in which the suit is brought, and where there is a controversy between him and a citizen of the State in which the suit is brought, the right to remove it from the State court to the Circuit Court of the United States regardless of the citizenship of the other defendants to the action.

Upon this question Judge Deady, in his opinion on the motion to remand, said:

"In a suit between a citizen of the State in which it is brought and a citizen of another State subsection 3 of § 639 of the Revised Statutes gave the latter, whether he was plaintiff or defendant, the right of removal. The courts following the narrow construction given to the same language in §§ 11 and 12 of the judiciary act of 1789 (Beardsley *vs.* Loney, 4 Wash., 286; Smith *vs.* Rines, 2 Sum., 338; Hubbard *vs.* Northern Railway Company, 3

Blatch., 84; Wood *vs.* Davis, 18 How., 467; Coal *vs.* Blatchford, 11 Wall., 172) held that, although the designation of the party plaintiff or defendant is in the singular number, is was intended to embrace all the persons who were on one side of the controversy, so that if either of two or more parties plaintiff were citizens of the same State with either of two or more parties defendant the case could not be removed.

"As the law then stood, before the passage of the act of 1887, this action could not have been removed to this court by either of the defendants, for some of them are citizens of Oregon, the same State as the plaintiff.

"But by the act of 1887 the foundation of the right of removal is not the mere pendency of a suit in a State court between a citizen of the State in which it is brought and a citizen of another State. It is enough if there is a suit pending in such court 'in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State;' and while the right to remove such suit is in effect thereby denied to the plaintiff, it is not given to the defendant collectively, but to 'any' one of them who 'is a citizen of another State.'

"These material changes in the language of the statute can only be considered, under the circumstances, as showing an intention on the part of Congress to restore the act of 1867 in this respect as it was before the compilation of the Revised Statutes. It is no longer necessary that the 'suit' should be between persons of diverse citizenship. It is sufficient if there is a 'controversy' involved in the suit between two such persons—the one being a citizen of the State in which it is brought—whatever may be the citizenship of the other plaintiffs or defendants. Nor can the right of removal thus given to 'any' defendant having the prescribed citizenship, with any respect for the ordinary significance of language, be construed to include 'all' the defendants and so be denied to 'any' unless 'all' have such citizenship.

"In support of the contrary view of the matter it is urged that the act of 1887 is a piece of what may be called 'confederate' legislation, in which there is a manifest purpose to restrain and limit the authority of the national courts, and therefore it is not likely that it was intended

to enlarge their jurisdiction in this class of cases. That such appears to be the general character of the act may be admitted. But it appears to be a piece of patchwork, in which probably a number of hands were engaged with, doubtless, somewhat diverse purposes. But, be this as it may, no court would be warranted on the strength of such a suggestion or circumstance in continuing the phrase 'any' defendant to mean 'all' the defendants, be they more or less."

Judge Jackson, in delivering the opinion of the court in Whelan *vs.* New York, L. E. & W. R. Co., *supra*, said:

"The removal in the present case cannot, therefore, be sustained under subdivision 3 of section 639, but must rest alone upon the fourth clause of amended section 2 of the act of March 3, 1887. Was the removal rightfully made under that clause? This presents the question whether a single defendant, being a citizen of a State other than that in which the suit is brought, who is jointly sued with other defendants, citizens of the same State as the plaintiff, may remove the suit to the circuit court upon making it appear to said court that on account of prejudice or local influence he cannot obtain justice in the State court or courts. Under former acts, as construed by the decisions above cited, all the material parties on one side of the suit having the requisite citizenship and right of removal were required to unite in the petition therefor; but under this fourth clause of the second amended section of the act of 1887 it is provided that where there is pending in any State court a 'suit' in which there is a 'controversy between a citizen of the State in which the suit is brought and a citizen of another State any defendant being such citizen of another State may remove such suit into the Circuit Court of the United States at any time before the trial thereof, when it shall be made to appear to said Circuit Court that from prejudice or local influence he will not be able to obtain such justice in such State court,' etc. The whole suit being removed by 'any' defendant having the requisite citizenship, and on making the proper showing to the Circuit Court as to his inability to obtain justice in the local court on account of prejudice or local influence, 'if it further appear (to said

court) that said suit can be fully and justly determined as to the other defendants, in State court, without being affected by such prejudice or local influence, and that no party to the suit will be prejudiced by a separation of the parties, said court may direct the suit to be remanded, so far as relates to such other defendants, to the State court, to be proceeded with therein.' This last paragraph of the clause clearly implies that there may be defendants to the suit, and even necessary parties, who are not entitled to remove the same; and it further contemplates and provides for a case in which the suit may be retained in the Circuit Court as against a single defendant, and, by the fair import of the language, such defendant must be the party who has effected the removal of the suit. The 'other defendants' as to whom a separation may be had, and the suit remanded, under the conditions stated, can not properly refer to the defendant at whose instance or on whose application the removal was made. If all the defendants to the suit, as under the act of 1867, are required to possess the requisite citizenship, and local prejudice must exist as to all, and all must join in the petition for removal before such removal can be properly allowed, what possible application, meaning, or effect can be given to this last paragraph of the clause? That construction of the clause would present this anomaly: That after all the defendants had applied for and obtained a removal of the suit on account of local prejudice, the Circuit Court could still separate and remand the suit so far as it relates to some of said defendants, because, as to them, it appeared there was no local influence or prejudice. The right to remove the suit is given to 'any defendant' being a citizen of the State other than that in which the suit is brought, when it is made to appear to the circuit court that 'he' cannot obtain justice because of local influence or prejudice. By what rule of construction is the language 'any defendant' to be interpreted as meaning 'all' the defendants to the suit? The natural import of the words and the whole structure of the clause admit of no such interpretation, without doing violence to the language employed."

"In Montclair *vs.* Ramsdell, 107 U. S. 147, 2 Sup. Ct. Rep. 391 it is said:

"It is the duty of the court to give effect, if possible, to every clause and word of the statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed. We should assume that the legislature was aware, when the act of April 15, 1868, was passed, that a previous statute had expressly excepted Bloomfield township from all of its provisions. When, therefore, they declared that the new township should come under the operation of any act from which Bloomfield had been specially excepted by any proviso thereof, the established canons of statutory construction requires us to presume that the legislature understood the full effect of such declaration."

"It must be assumed that Congress, in the enactment of this clause of the act, was aware of the fact that under the construction placed upon the prior removal acts (except perhaps the act of 1866) all the parties on the side, seeking the removal, were required not only to possess the requisite citizenship, but to join in the application for such removal. When, therefore, Congress declared that 'any defendant' being a citizen of another State might remove the suit upon making it appear that from prejudice or local influence he could not obtain justice, the well-settled rules of construction require the court to presume that the legislature understood and intended the full effect of such declaration, and meant not to confine the right of removal to all, but to extend it to 'any' defendant, citizen of another State, who could make 'it appear to said circuit court' that local influence or prejudice would prevent his obtaining justice in the local forum in a suit which involved a controversy between himself and the plaintiff therein. In so far as the act of 1887 copies old clauses or provisions of former statutes, it may properly be regarded as a legislative re-enactment of the meaning which the Supreme Court had given to such clauses; but in respect to new provisions, while they should, as far as possible, be interpreted, so as to harmonize with the general scope of the act, and form a consistent

whole, they are to be construed according to their plain and obvious meaning, if the language admits of no ambiguity. The last act must be taken as the law on the subject it embraced; and, 'when the meaning is plain, the court cannot recur to the original statutes to see if errors were committed in revising them.'" Iron Co. *vs.* Ashburn, 118 U. S. 54, 6 Sup. Ct. Rep. 929. "The clause under consideration is a distinct, separate and independent provision referring to a class of cases not embraced in or covered by the three preceding clauses of amended section 2. By the first clause of said section the right of removal is given to 'the defendant or defendants,' without reference to his or their citizenship. By the second clause the removal may be had 'by the defendant or defendants therein being non-residents of that State.' The third clause simply copies clause 2, Sec. 2 of the act of 1875, and relates to separable controversies in which one or more of the defendants actually interested therein may remove the suit to the circuit court. This third clause must manifestly receive the same construction heretofore placed upon it by the Supreme Court in numerous cases. The 'defendant or defendants' on whom the rights of removal is conferred by the first and second clauses may include all the defendants, and require all to possess the right and to unite in the application for removal. But when we come to the new provision of the fourth clause, the general terms indicative of all the parties entitled to remove are dropped or changed, and the right of removal is given to 'any defendant.' The language of this clause is essentially different from that of subdivision 3 of section 639, which allowed the removal on the petition of the non-resident 'plaintiff or defendant'—terms which properly described all the parties on the one side or the other of the suit, and required all on the removing side to be in position to exercise the right, and to join in the petition. When thus compared with the old law and the three preceding clauses of said amended section 2, it seems perfectly manifest that this new (fourth) clause was intended, as its language fairly imports, as an enlargement of the rights of removal, and enables 'any defendant' being a citizen of another State,

between whom and the resident plaintiff in a local suit there is 'a controversy,' to remove the 'suit' by leave of the circuit court upon cause shown."

I cannot find that these decisions were questioned until the decision of Judge Shiras in Anderson *et al vs.* Bowers *et al* (Circuit Court N. D. Iowa, 43 Fed. Rep., 321), or have ever been questioned by any court except in that case. Judge Shiras in that case held that under act Congress August 13, 1888, amending act March 3, 1887, section 2, clause 4, providing that in actions in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State any defendant being a citizen of another State may remove the action on the ground of local prejudice, the right of removal does not exist where the controversy is between a citizen of the State wherein the suit is pending on the one side and a citizen of the same State, and a citizen of another State on the other side. In his opinion, referring to the construction theretofore given to this clause in this respect, he says:

"It cannot be gainsayed that the words are susceptible of this construction, and if the class of cases removable under this clause had not been previously defined and limited, it might well be that such construction would be permissible. In view, however, of the settled construction given to the preceding portion of the clause, I do not think this possible implication should be held to show that it was intended to change the meaning of the terms previously used. It seems to me to be the true rule to give the words, 'In which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State," the same meaning in the act of 1888, as was given them in construing the act of 1867, thus holding that the class of cases removable on the ground of prejudice and local influence is confined to those in which there is a controversy between a citizen or citizens of the

State in which the suit is pending, and a citizen or citizens of another or other States, but not including such in which there is a controversy, partly between a citizen or citizens of the State wherein the suit is pending, and a citizen or citizens of other States, and partly between citizens of the same State. Admitting that there is a doubt as to the proper construction of the act, it still follows that this court should not retain the case, as it is better to leave the cause in the court whose jurisdiction is undoubted."

In Wilder *vs.* Virginia L. & C. Steel & Iron Company *et al.*, Circuit Court (Western District Va., 46 Fed. Rep., 676) Chief Justice Fuller held that—

"While a single defendant being a citizen of a State other than that in which the suit is brought, who is jointly sued with other defendants, citizens of the same State, as complainants, may remove the suit to the Federal Court on the ground of local prejudice, yet such removal cannot be made when the complainants are not all citizens of the State in which suit is brought, and all are concerned adversely, to the non-resident defendants who seek to remove the same."

This decision was rendered after the opinion of Judge Shiras, in Anderson *vs.* Bowers *et al.* was published. If not an express decision that the right of removal exists on the part of a defendant who is a non-resident of the State in which the suit is brought, notwithstanding there are other defendants who are residents of the State it at least proceeds upon the assumption that such is the law.

If such removal is in terms authorized by the act of March 3, 1887, is the act Constitutional?

In the opinion upon the motion to remand in this case this question is discussed by Judge Deady, in his usual able and comprehensive manner. He says:

"The question whether Congress has the power to provide for the removal of a case from a State to a national court, in which some of the necessary parties defendant are citizens of the same State with the parties plaintiff or some of them, has not been directly decided by the

Supreme Court. It was argued before that tribunal with marked ability and research in the case of the Sewing Machine Companies, 18 Wall., 553. But as the court held that Congress had not then undertaken to confer such power on the circuit courts it was not decided.

"Mr. Dillon (Removal of Cause, § 27) is clear that the judicial power of the United States includes such cases, and therefore Congress may confer jurisdiction over them on the circuit courts by the process of removal or otherwise. In Lockhart *vs.* Horn, 1 Woods, 628, Mr. Justice Bradley, in considering a case brought in the circuit court under § 11 of the judiciary act of 1789, said: 'Were this an original question I should say that the fact of a common State citizenship existing between the complainants and a part only of the defendants, provided the other defendants were citizens of the proper State, would not oust the court of jurisdiction. It certainly would not under the Constitution. The case would still be a controversy between citizens of different States.'

"The Constitution (art. 3, § 2) provides: 'The judicial power shall extend to all cases in law and equity arising under the Constitution of the United States and treaties made or which shall be made under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States, and between a State or the citizens thereof and foreign States, citizens, or subjects.'

"The change in the language of this section from the use of the term 'cases' to 'controversies' is apparently deliberate and premeditated, and in the case of an instrument so carefully prepared and considered as the Constitution of the United States cannot be regarded as fortuitous or without special significance. In my judgment it was intended by the use of the terms 'cases' and 'controversies' to distinguish between an ordinary action or suit which may include many parties, plaintiff or defendant, and involve the examination and consideration of more

than one item of dispute or controversy and so much and such part of such proceeding as may only constitute a controversy between two or more of said parties who are citizens of different States. There may be a controversy in a case which is less than the whole of it. Both the act of 1875 and that of 1878 (§ 2) make express provision for the removal of a case—the whole case—in which there is a separate controversy between citizens of different States.

"A controversy between citizens of different States is none the less such a controversy because they are not the only parties to it. A controversy in the contemplation of the Constitution is but a dispute concerning rights or wrongs cognizable by law and which may therefore be the subject of an action or involved therein. To confine the operation of the words 'controversies between citizens of different States' to cases wherein the controversy is exclusively between citizens of different States is to interpolate a word into the grant of judicial power which materially limits and restrains its operation. As well might it be claimed that the judicial power extends 'to all cases affecting ambassadors, other public ministers and consuls' and them only. Then a suit might be brought in a State court against or affecting a foreign minister and Congress would be powerless to authorize its removal if the plaintiff took the precaution, as he doubtless would, to make some third person a codefendant. What the effect of such a state of things would be on the relations of the United States with other governments may be easily imagined. The extension of the judicial power over a controversy between citizens of different States is not to be rendered nugatory by the accidental circumstance that it forms a part of or is involved in a suit between citizens of the same State. On the contrary, the jurisdiction in such cases must be held to include all the incidents which inhere in or attach to the controversy. 'Congress has power to make all laws which shall be necessary and proper to carry into execution' the grant of judicial power (Con. U. S., art. I, § 8), and thus make it equal to the great and beneficent purpose for which it was intended, and in so doing may, in my judgment, confer jurisdiction on the circuit courts of a case involving a controversy, whether separable or not, between citizens of different States, by

removal or otherwise; and this, although some of the parties plaintiff and defendant in the suit are citizens of the same State."

On this point I quote again from the opinion of Judge Jackson in Whelan *vs.* N. Y. L. E. & W. R. Co., *supra*, He says :

"It was suggested on the argument of the question presented by the pending motions, but has not been urged in the brief of counsel, that, under the grant of judicial power in the Constitution, Congress could not authorize the removal of a suit from the State court situated as this case is, at the instance of one non-resident defendant, and thus confer upon this court jurisdiction to try the suit, in which there was also a controversy between the plaintiff and other resident defendants. This precise question has not been directly decided by the Supreme Court. It was presented and argued by distinguished counsel in the Sewing-Machine Case, 18 Wall., 558, where the parties to the suit were situated substantially the same as in the present case, so far as their citizenship was concerned; but the Supreme Court did not pass upon it, the decision having rested upon the construction of the judiciary act and the act of March 2, 1867, both of which fall short of conferring upon the circuit court the full judicial power granted in and by the Constitution. The clause in the Constitution extending the judicial power to the controversies between citizens of diferent States," was intended to secure the citizen against local prejudice, which might injure him if compelled to litigate his controversy with another in the tribunals of a State not his own. This object was the avowed purpose of the Constitutional provision at the time of its adoption, and the Supreme Court so declared in Gordon *vs.* Longest, 16 Pet., 104, where it is said said that 'one great object in the establishment of the courts of the United States and regulating their jurisdiction was to have a tribunal in each State, presumed to be free from local influence, and to which all who were non-residents or aliens might resort for legal redress."

"For the attainment of this object Congress could have

vested the circuit court with original jurisdiction in cases like the present, although some of the defendants are residents of the same State with the plaintiff. A single Federal purpose or ground of jurisdiction would be sufficient in the exercise of the constitutional power to confer such authority. This proposition is supported by the decisions of the Supreme Court touching the Federal jurisdiction growing out of the subject-matter of the suit."

"Thus, in Mayor *vs.* Cooper, 6 Wall., 247, it is said by the court: 'Nor is it any objection that questions are involved which are not of a Federal character. If one of the latter exists, if there be a single such ingredient in the mass, it is sufficient.'"

"And, having assumed jurisdiction because of this single Federal 'ingredient' the court will proceed to decide all questions in the suit of a purely local character. So, under the second clause of section 2 of the act of 1875, providing for the removal of separable controversies of a Federal character, the whole suit is transferred to the Circuit Court, although it may involve other questions and controversies of a purely local nature and belonging properly to the State courts in which the suit was brought. It results necessarily from the supremacy of the Federal Constitution and the laws passed by Congress within the limits of the powers conferred, that a single Federal object may control the question of jurisdiction, even when the suit includes or relates to other matters or parties which come properly within the local jurisdiction. This is clearly asserted in Barney *vs.* Latham, 103, U. S., 20, and that decision sustained the constitutionality of the act of 1875, which, under the separable controversy clause, enabled one defendant to remove the whole suit. If a single defendant with a separable controversy may be given the right to remove the whole suit, which includes other matters of a local character, why may not a single defendant, having the requisite citizenship, be vested with the same right although joined with resident defendants, when it is made to appear to the court that from prejudice or local influence he cannot obtain justice? The Federal judicial power extends as well to one case as the other, and it rests in the legislative discretion of Con-

gress to say when and under what circumstances and conditions it shall be exercised. It would be strange, indeed, if, having the power to confer original jurisdiction in cases like the present Congress could not lawfully give the right of removal."

"The statement of the court in Gaines *vs.* Fuentes, 92 U. S. 10, that 'in cases where the judicial power of the United States can be applied only because they involve controversies between citizens of different States it rests with Congress to determine at what time and upon what conditions the power may be involved, whether originally in the Federal court or after suit is brought in the State court; and, in the latter case, in what stage of the proceedings, whether before issue or trial by removal to a Federal court, or after judgment upon appeal or writ of error,' seems to leave little or no room to doubt the power of Congress to authorize the removal in the present case. The argument in favor of the power was never more forcibly and conclusively presented than by counsel for plaintiff in error in the Sewing Machine case, 18 Wall, 558-562. In Fisk *vs.* Henarie, 32 Fed. Rep. 425, Judge Deady considered and discussed this question with his usual ability and clearness, reaching the conclusion that this new legislation was clearly within the grant of judicial power conferred upon Congress in and by the constitution. This court, after carefully re-examining the question, has no doubt that cases like the present are within the judicial power of the United States, and that by this new legislation upon the subject of removals because of local prejudice Congress intended to call such power into exercise, and allow 'any defendant" possessing the requisite citizenship, and making the required showing as to local prejudice or influence, to have the suit removed to the circuit court. The demand sought to be enforced in such suit may be joint against two or more defendants, one of whom is a citizen of the State of the plaintiff and of the forum, while the other, being a citizen of a different State, comes within the range of the federal judicial power. In such cases, though jointly sued with resident defendants, there is still a controversy between such non-resident defendants and the resident plaintiff, which the federal

judiciary can lay hold and determine, although it may be so associated or connected with other local issues and matters as to require their decision also. The single federal 'ingredient' involved in such a controversy between citizens of different States comes within the grant of federal judicial power which Congress may make effective and operative by legislation in such mode and under such conditions as may be deemed expedient. The object which the constitutional grant of power was intended to secure was to protect the non resident citizens against local prejudices which might injure or do him injustice. That object cannot be attained if non-resident defendants, all or any, are compelled to litigate in the forum of the plaintiff, where there exists local influence or prejudice which would prevent such defendant from obtaining justice. In every suit there is 'a controversy' between the plaintiff and each of the defendants against whom relief is sought, or where, as the result of a judgment against him, any defendant is compelled to render something in favor of the plaintiff which is controverted or disputed by such defendant."

In Gaines *vs.* Fuentes *et al*, 92 U. S. Rep., 10, it was held:

"That under the act of March 2, 1867, 14 Stat., 558, in authorizing and requiring the removal to the Circuit Court of the United States of a suit pending or afterwards brought in any State court involving a controversy between a citizen of the State where the suit is brought and a citizen of another State thereby invest the Circuit Court with jurisdiction to pass upon and determine the controversy when the removal is made, though that court could not have taken original cognizance of the case."

III.

WERE THE PETITION, AFFIDAVITS AND PAPERS BEFORE THE UNITED STATES CIRCUIT COURT, WHEN THE MOTION TO REMAND THIS CAUSE WAS DENIED, TAKEN IN CONNECTION WITH THE FACTS OF WHICH THE COURT COULD TAKE JUDICIAL KNOWLEDGE AND THE STATUS OF THE CASE SUFFICIENT TO SUSTAIN THE DECISION AND JUDGMENT OF THE COURT?

Upon the question as to how the prejudice or local influence warranting the removal of a cause from a State to the United States court may be "made to appear" the authorities are conflicting. The opinion of the court *In re* Pennsylvania Co., (137 U. S., 457), leaves it optional for each judge to pursue any course which he deems proper. It has been decided in a number of cases that a defendant can remove a cause by filing an affidavit that he has reason to believe that from prejudice and local influence he will not be able to obtain justice in a State court, and that his affidavit, if deemed sufficient to authorize the court to act, cannot be controverted by the opposite party. To this effect are the decisions in Neale *vs.* Foster, (31 Fed. Rep., 53); Fisk *vs.* Henarie, (32 Fed. Rep., 147, 35 Fed. Rep., 230); Hills *vs.* Railroad Co., (33 Fed. Rep, 81); Whelan *vs.* Railroad Co., (35 Fed. Rep., 849); Huskins *vs.* Railway Co., (37 Fed. Rep., 504); Cooper *vs.* Railroad Co., (42 Fed. Rep., 697); Brodhead *vs.* Shoemaker, (44 Fed. Rep., 518.)

In other cases it has been held that the petition and affidavit for removal must state that such "prejudice or local influence" exists. In others, that the defendant must state in his affidavit facts showing the existence of prejudice and local influence, and in others that the opposite party is entitled to a hearing upon the application for removal, and may controvert the showing of prejudice and local influence made by the defendant. The only declaration of this court upon the subject is that contained in the opinion of the court, as announced by Mr. Justice Bradley, *In re* Pennsylvania Company, already cited, that the Circuit Court must be legally satisfied of the truth of the allegation, and that "legal satisfaction requires some proof suitable to the nature of the case, at least the affidavit of a credible person and a statement of facts in such affidavit, which sufficiently evince the truth of the alle-

gation." It was not held in that case, and I think it will not be, that the evidence required to legally satisfy the court must be by affidavit.

The question raised by the fourth assignment of error in the brief for plaintiff in error does not arise in this case. The petition for removal contains an allegation in positive terms of prejudice and local influence. It is as follows:

"THAT FROM PREJUDICE AND LOCAL INFLUENCE YOUR PETITIONERS WILL NOT BE ABLE TO OBTAIN JUSTICE IN THIS COURT OR IN ANY OTHER STATE COURT TO WHICH THE SAID DEFENDANTS MAY UNDER THE LAWS OF THIS STATE REMOVE SAID CAUSE."

The affidavit of the defendants Henarie and Eleanor Martin also state in positive terms the existence of such prejudice and local influence as will prevent the defendants from obtaining justice in said State court, *i. e.*, the Circuit Court of the State of Oregon for Multnomah county, or in any other State court in which said defendants, under the laws of the State of Oregon, have a right to remove the same, &c. The language of the affidavit is not that I have reason to believe, and do believe only, but "I SO STATE THAT FROM," etc., and therefore the application was *in form* sufficient under the rule laid down in all the decisions which have held that a positive statement of the existence of prejudice and local influence is sufficient. *In re* Pennsylvania Company, *supra*, the question decided was not that the affidavit for removal was not sufficient, "but only that the court was not bound to regard it as such." In this case the question is whether the court was bound to regard the petition, affidavit, and facts presented in the record, taken in connection with the facts of which the court could take judicial knowledge as insufficient and to re-

mand the case. *In re* Pennsylvania Company, *supra*, this court said: "The amount and manner of proof required in each case must be left to the discretion of the court." The proof need not necessarily be by affidavit. A copy of the record in a case might contain stronger, more convincing and more satisfactory proof than any number of ex parte affidavits. Public records, public acts, judicial decisions, reports of legislative and judicial investigations, of which the court could take judicial knowledge, might furnish important facts, making prejudice and local influence appear or tending to convince the court of its existence. In this case the certified transcript of the papers which were before the court disclosed the facts that the action had been brought to recover for services performed under an alleged contract for the sale of a Congressional land grant, that one change of the place of trial in a State court had been made; that after the removal upon the first trial the jury, "*under the direction of the court*," returned a verdict for the defendants; that upon the second trial, upon presumably the same evidence, and in disregard of the instructions of the court, the jury had returned a verdict in favor of the plaintiff for $60,000, and upon motion of the defendants a judgment had been entered by the court in their favor for costs and disbursements *notwithstanding the verdict*; that on the third trial the jury had *disagreed*; the transcript contained copies of letters from the plaintiff concerning the alleged contract upon which the action was brought, set forth in bills of exceptions, in such a manner as to enable the circuit court to place a proper estimate upon the action of the juries who had tried the cause in the State court, and to make it appear to a judicial mind that prejudice and local influence existed which would prevent the defendants having a fair trial.

There is no apparent reason why the United States Cir-

cuit Court, upon an application to remove a cause from a State to a Federal court on account of prejudice or local influence or on motion to remand, should not take judicial knowledge of facts pertinent to the inquiry the same as on a trial of the cause upon its merits. The court could take judicial knowledge upon the motion to remand, that the land grant mentioned in the complaint had been the subject of much controversy in the Oregon legislature, in Congress, and between citizens of Oregon and the defendants in this case in both the Federal courts and the State courts of Oregon; that there were numerous settlers or squatters upon the land claiming that the grant had not been earned by the grantee by compliance with the conditions of the grant; that the lands had been the subject of a protracted investigation by a committee of the Oregon legislature by a commission appointed by the Secretary of the Interior, and by numerous agents of the Interior Department, and had been the subject of investigation in Congress. In view of the foregoing, and considering the fact that the amount and manner of proof required in each case must be left to the discretion of the court itself ought this court to hold that the circuit court in this case was not legally satisfied of the truth of the allegation of prejudice and local influence contained in the petition.

To aid the court in ascertaining what Congress meant by the words, "when it shall be made to appear in the Circuit Court," a statement of the history of the fourth clause of the second section of the act upon its passage through Congress is presented. This statement, although borrowed from the brief of counsel in *In re* Pennsylvania Company, has been verified by reference to the bills, reports, and record, and found correct.

"The original act was both before the 48th and 49th Congresses, and the fourth clause thereof when first introduced was as follows:

"And where a suit is now pending, or may hereafter be brought in any State court in which there is a controversy between a citizen of the State in which a suit is brought and a citizen of another State, such citizen of another State, whether he be plaintiff or defendant, may remove such suit into the Circuit Court of the United States for the proper district, at any time before the trial thereof, *by filing an affidavit in such State court, setting forth that he has reason to believe and does believe* that from prejudice or local influence he will not be able to obtain justice in such State court.'

"On February 5, 1884, the House Committee on the Judiciary reported back the bill with the following proposed amendment, 'Strike out all after the word 'thereof' in line 80, down to the word 'that' in line 82, and insert the following: 'when it shall be made to appear to the satisfaction of the court.' The committee on the very next page of its report proceeded to give its own contemporaneous exposition of the language which it proposed to insert: 'The committee, however, believe that when a plaintiff makes affidavit, that from prejudice or local influence he believes that he will not be able to obtain justice in the State court he should have the right to remove the cause to the Federal court. *The bill secures that right to a plaintiff.*' Pp. 1, 2, Rep. No. 196, Vol. I, House Reports, 48th Congress, 1st session.

"The suggested amendment thus interpreted by its proposers was inserted in the bill which passed the House January 13, 1887, in these words: 'And where a suit is now pending or may be hereafter brought in any State court in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State, such citizen of another State, whether he be plaintiff or defendant, may remove such suit into the Circuit Court of the United States at any time before the trial thereof, *when it shall be made to appear to the satisfaction of the court* that from prejudice and local influence he will not be able to obtain justice in said State court.' Vol. 18, Cong. Rec., 613.

"When the bill thus amended came up in the Senate, it was amended by striking out the words, 'whether he be plaintiff or defendant,' and by inserting the words, 'any defendant being,' and by striking out the word 'satisfac-

tion,' and by inserting the words 'said circuit,' so that the same read, 'any defendant being such citizen of another State may remove such suit into the Circuit Court of the United States for the proper district; when it shall be made to appear to said Circuit Court that from prejudice and local influence he will not be able to obtain justice in such State court,' and by adding to the clause these words, 'or in any other State court to which the said defendant may under the laws of the State have the right, on account of such prejudice or local influence, to remove the cause; provided, that if it further appear that said suit can be fully and justly determined as to the other defendants in the State court, without being affected by such prejudice or local influence, and that no party to the suit will be prejudiced by a separation of the parties, said Circuit court may direct the suit to be remanded, so far as relates to such other defendants, to the State court ,to be proceeded with therein. At any time before the trial of any suit which is now pending in any Circuit court or may be hereafter entered therein, and which has been removed to said court from a State court, on the affidavit of any party plaintiff, that he has reason to believe and does believe that from prejudice or local influence he was unable to obtain justice in said State court, the Circuit court shall, on the application of the other party, examine into the truth of said affidavit and the grounds thereof, and unless it shall appear to the satisfaction of said court that said party will not be able to obtain justice in such State court it shall cause the same to be remanded thereto.'

"The bill thus amended became a law in the present form.

"Vol. 18, Cong. Rec., 2542."

Let us now proceed to consider the questions raised by the second and third errors specified in the brief for plaintiff in error in substance that the petition for removal was filed in the State court and not in the Federal court, and that a formal order removing the cause had not been made by the latter court before the motion to remand was made.

If the portion of the act of 1867, section 639 of the Re-

vised Statutes, providing the manner of removal of a cause from a State to a National court on account of prejudice or local influence is repealed, it must be conceded that no method of procedure to secure the removal of a cause in such a case has been prescribed. Recognizing this difficulty Judge Brewer in Short *vs.* Chicago M. St. P. Ry. Company (*supra*) said:

"There being no form, no procedure prescribed I think the court, in any particular case, may prescribe a mode of procedure or might lay down a general rule applicable to all cases. And 'As a question of practice, and out of respect to the State court I think that the affidavit of prejudice or local influence may be filed in that court, and then a certified copy filed in this.'"

This was the course adopted in Whelan *vs.* N. Y. L. E. & W. R. Co. (*supra*), *in re* Pennsylvania Company (*supra*), and in some other cases, as well as in the case at bar. Can there be any doubt as to the correctness of this method of procedure? Would not a properly certified transcript of all the pleadings and papers in the case, including the petition and affidavit for removal, be sufficient to make the facts necessary to be shown appear to the Circuit Court. This was what was before the Circuit Court in this case, and upon which the decision denying the motion to remand was made. It makes no difference that the decision of the Circuit Court determining that the case should proceed in the Federal Court was made upon a motion to remand instead of by an order for the removal of a cause. An order by a Circuit Court of the United States removing a cause from a State court is in legal effect *an order that the cause shall proceed in the Circuit Court.* An order denying a motion to remand a cause is in legal effect *an order that the cause shall proceed in the Circuit Court.* When

a plaintiff treats a cause as removed, and moves to remand it *instead of filing his objections to the removal*, and upon the denial of his motion to remand, moves to set the case down for trial and proceeds to the trial in the United States Circuit Court will he in this court be heard *for the first time* to object that the cause was not removed to the Circuit Court? The plaintiff instead of treating the filing of the transcript in the Circuit Court as a proceeding to procure a removal of the suit, treated it as already removed, and did not in the court below raise the question as to whether the application for the removal was properly made in the State court, and there being no assignment of errors as required by sections 997 of the Revised Statutes has not attempted to bring that question before this court in the manner required by statute and the rules of court. The plaintiff waived his right, if any he had, to insist that the petition and affidavit for removal should have been filed in the Circuit Court and not in the State court. In French *vs.* Hay, (22d Wallace, 238), it was held that a similar objection would not be listened to in this court, the point never having been made in the court below until three years after the removal was made, and when the testimony was all taken and the case ready for trial. In case of Ayres *vs.* Watson, (113 U. S. Rep., 598), it was held by this court that the direction contained in the third section of the act of 1875 for obtaining the removal of cases may, to a certain extent be waived, and "that a waiver may be expressed or implied." The plaintiff ought not to be permitted now, for the first time, to raise the question as to whether the petition and affidavit for removal were properly filed in the first instance in the State court. (See also Larson *vs.* Cox, 18 Pac. Rep. and note.)

IV.

WAS THE PLAINTIFF ENTITLED IN THE COURT BELOW TO DENY THE ALLEGATION OF PREJUDICE AND LOCAL INFLUENCE AND TO CONTROVERT THE PROOFS TO SHOW ITS EXISTENCE SUBMITTED BY THE DEFENDANTS?

Little can be added upon authority or principle to the forcible and exhaustive reasoning of Judge Jackson upon this question in Whelan *vs.* New York, L. E. & W. R. Co., *supra.* What he so truthfully and well says as to the unseemly and indelicate functions and duties of the Circuit Courts of the United States under the act of 1887, if the construction of it is to prevail, which is contended for on the part of the plaintiff in error in this case—that is, that the plaintiff has a right upon an application for the removal of a cause from a State to a Federal court on the ground of prejudice and local influence, to deny the existence of such prejudice and local influence demand a trial of the issue and to file counter affidavits, is worthy of careful consideration.

The instances which he cites of cases in which similar language to that used in the act of 1887 has been construed by the courts not to require a finding by the court upon evidence taken in such a manner that both sides can be heard it is believed might be multiplied.

Judge Jackson, in his opinion in the case referred to, said:

"The plaintiff, as a part of his motion to remand, denies the existence of such prejudice or local influence, and demands a trial of that issue. If he is entitled to have such a preliminary trial his motion to remand would, of course, have to await the result of that investigation, unless other grounds exist on which to rest the motion. It is conceded by the counsel for the plaintiff that by the old law and the practice under it the State courts to which applica-

tions for removal were addressed never entered or were authorized to enter upon such an investigation as he herein demands of this court before taking action thereon.

"Under the third subdivision of section 639, Rev. Stat., based on the act of March 2, 1867, amending the act of July 27, 1866, the general statement made in the affidavit of the petitioners was considered sufficient without any detailed setting forth of the facts which constituted the reasons of his belief. He was not required to prove these statements as facts, or affirmatively to show, except by the tne affidavit, that he could not obtain justice in the State courts.

"It was always held to be enough if, under oath, he stated the reasons which the statute assigned as the ground for removal. Bowen *vs.* Chase, 7 Blatch., 255.

"A party may always in proper way and time put in issue jurisdictional facts, such as the citizenship of the opposing side, and rightfully demand a trial thereon; but statutory requirements which form a part, even an indispensable part, of the process of removing a suit from State to Federal courts, in any or all of the cases mentioned in the last or former acts of Congress, while they must be complied with in order to perfect the right to removal, are not to be confounded with jurisdictional facts on which a trial by proper pleadings may be demanded. The right to removal depends upon the statute giving the authority therefor and not upon the legislation which defines the original jurisdiction of the Circuit Courts of the United States, and should not therefore be restricted or limited by the latter legislation. Green *vs.* Custard, 28 How., 484, and Bushnell *vs.* Kennedy, 9 Wall., 387.

"In conferring upon the Circuit Court of the United States the authority to act upon the application for removal of suits from State courts, Congress certainly never intended to make the question as to the existence or non-existence of prejudice or local influence, which would prevent a non-resident citizen defendant from obtaining justice in the local courts, a jurisdictional fact such as would entitle the side opposing the removal to dispute its truth and put the matter in issue for formal trial.

"The requirements of the statute that, under certain conditions therein stated, a party defendant may have the

suit removed to this court 'when it shall be made to appear to said Circuit Court that from prejudice or local influence he will not be able to obtain justice in such State court,' constitutes nothing more than a part of the process of removing the suit. Steps forming a part of such process of removal under no previous statute were ever regarded as issuable, and the subject-matter of a preliminary trial before the application for removal could be properly acted upon. The distinction between jurisdictional facts, properly speaking, which may be made the subject of issue or trial, and model and formal requirements to the exercise of the right of removal, is clearly pointed out by Mr. Justice Bradley, speaking for the court, in Ayers *vs.* Watson, 113 U. S., 597, 598. Model requirements and conditions prescribed by statute, in order to exercise the right of removal, may be waived, but jurisdictional facts proper cannot be. French *vs.* Hay, 22 Wall., 238; Ayers *vs.* Watson, 113 U. S., 594; Railroad Co. *vs.* Hart, 114 U. S., 654; Railroad Rem. Cases, 115 U. S., 1.

"The construction which plaintiff's counsel contend should be placed upon this provision of the act would be a radical departure from the judicial legislation of Congress since the foundation of the Government and of the practice thereunder, and would involve on the part of this court the exercise of the most unseemly and indelicate functions and duties, which could not fail to excite jealousies and create hostilities against the Federal judiciary and disturb that comity and respectful consideration which should ever exist between the courts of the United States. It is urged by plaintiff's counsel that the provision for removing the suit 'when it shall be made to appear to said Circuit Court' are new words not previously used in any statute on this subject, and should be interpreted according to their common and usual signification; being evidently employed for the purpose (as contended) of requiring a finding by the court upon evidence taken according to the form of law, and in such manner that both sides can be heard. This position, which is only a re statement of the proposition already noticed, assumes the question of local prejudice and the right to remove the suit therefor, is a proceeding between the parties to the action; that the right of removal involves a matter of controversy

between the plaintiff and the defendant seeking such removal. This assumption is not well founded; neither is it correct, as claimed, that the words 'when it shall be made to appear to said Circuit Court' are so new and different from those previously employed in the legislation of Congress on the subject of removals as to indicate an intention to completely change the method and practice in effecting removals.

"The twelfth section of the Judiciary Act of 1789 provided that 'if a suit be commenced in a State court against an alien, or by a citizen of another State, and the matter in dispute exceeds the aforesaid sum of $500, exclusive of costs, to be made to appear to the satisfaction of the court,' the defendant party might, on entering his appearance, and by the process specified in the section, cause the suit to be removed 'for trial to the next Circuit Court to be held in the district where the suit is pending.'"

"While this section was in force Longest sued Gordon in the State Court of Kentucky. On entering his appearance, the defendant filed his petition to remove the cause to the Circuit Court of the United States for the District of Kentucky, on the ground that he was a citizen of Pennsylvania and the plaintiff a citizen of Kentucky. The citizenship of the parties, as alleged, was admitted; but the plaintiff resisted the removal, and the State Court refused to allow it, on the ground that 'it did not appear its satisfaction that the amount in controversy exceeded $500, exclusive of costs.' The Supreme Court of the United States, in *Gordon vs. Longest, 16 Pet. 97*, held this action of the State Court erroneous. The plaintiff, in his declaration or petition, having laid his damages at $1000, the State Court could not properly go into a consideration of the amount involved in order to be satisfied that it exceeded $500, before allowing the prayer of the petition for removal.

"Again, by section 643 Rev. Stat., embodying parts of Acts of Congress enacted in 1833, 1866, and 1871, relating to the removal of civil suits or criminal prosecutions commenced in State Courts against revenue officers of the United States, or against officers acting under the authority of federal election laws, it is provided, among other things (paragraph 7), that if, upon the removal of such

suit or prosecution, 'it is made to appear to the Circuit Court,' that no copy of the record and proceedings therein in the State Court,' can be obtained, the Circuit Court may allow and require the plaintiff to proceed *de novo*, etc.

"It would hardly be asserted that before the Circuit Court could require the plaintiff to proceed *de novo* under this provision of the statutes, that it would be required to enter upon a formal investigation or trial of the question whether a copy of the State record could be obtained. Under this section the Circuit Court to which the defendant seeking the removal presents his petition in the first instance, decides every question relating to the sufficiency of the petition, affidavit and accompanying certificate, and its own jurisdiction in the matter. Dennistoun *vs.* Draper, 5 Blatchford, 336. And if the petition, upon its face, shows a case within the terms of the section, the suit or prosecution in *ipso facto* removed into the Circuit Court, and the jurisdiction of the State Court is at an end. It may be remarked, in passing, that this section, whose constitutionality was upheld in Tennessee *vs.* Davis, 100 U. S. 257, applied both to civil and criminal cases, and included any case that comes within its terms, without referonce to the amount in dispute, if the suit be of a civil nature. Wood *vs.* Matthews, 2 Blatchford, 370. And the suit or prosecution, when actually removed from the State Court, by the defendant officer, goes as a whole to the Circuit Court, with all the parties thereto. Fisk *vs.* Railroad, 6 Blatchford, 362.

"It will be noticed that the fourth clause of the second amended section of the Act of 1887 has several features in common with this section of the Revised Statutes. But again by section 5 of the Act of March 3, 1875, it is provided 'that if in any suit commenced in the Circuit Court, or removed from a State Court to a Circuit Court, it shall appear to the satisfaction of said Circuit Court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court, etc., it shall proceed no further therein, but shall dismiss or remand the same. Here the language is, 'If it shall appear to the satisfaction of said Circuit Court' that certain jurisdictional facts are wanting,

the Court is required to proceed no further; but these terms were never held to impose upon the Court the duty of trying any or all collateral facts or issues that could possibly be raised touching the steps or proceedings had in effecting removals, which fell short of the question of its actual jurisdiction.

"By the fourth clause of amended section 2 of the act of 1887 the removal is to be had 'when it shall be made to appear to said Circuit Court' that such prejudice or local influence exists in the State court or courts, as shall prevent the petitioning defendant, being a citizen of a State other than that in which the suit is brought from obtaining justice.

"This certainly does not properly involve or require the investigation and judicial establishment of a fact which the plaintiff in the suit is given the right to controvert.

"The statute makes no provision for giving notice to the plaintiff of the application to remove, and the petitioning party has not heretofore been required, either by the statute or the practice of the courts to which petitions for removal were addressed, to give any notice to the adverse party of his application for such removal of a suit from the State court.

"Wehl *vs.* Wald, 17 Blatchford, 342, and Stevens *vs.* Richardson, 9 Fed. Rep. 194, where it is said by Judge Blatchford that 'it has always been held in this court that no notice of the application for removal was necessary,' citing Fisk *vs.* Railroad Co. 8 Blatchford, 243. No notice of the application for removal being required, it results necessarily that the court which acts upon such application must proceed upon the *ex parte prima facie* showing made by the petition and affidavit accompanying the same, leaving to the adverse party the right to question by proper plea in the Circuit Court, the strictly jurisdictional facts presented in the application.

"Barry *vs.* Edmunds, 116 U. S., 559, relied on by the plaintiff's counsel, is not in conflict with these propositions. In that case the court does recognize that the jurisdictional facts embraced in section 5 of the act of 1875, may, by proper pleading and at the proper time, be put in issue and a trial had thereon.

"That section created certain new jurisdictional facts proper on which issue could be taken by the adverse party. But no such effect can be given to the requirement of the present law in designating the time and mode of removal.

"Under this act of 1887 the Circuit Court is invested with the authority heretofore conferred upon and exercised by the State courts, in acting upon applications for removal, and has imposed upon it the further authority of directing the suit to be remanded, so far as relates to defendants other than the one applying for the removal, 'when it appears' to said court that said suit can be fully and justly determined as to such other defendants in the State court, without being affected by local prejudice, and no party will be injured by a separation of the parties. Can it, with any show of propriety or reason, be asserted that this proviso to the fourth clause of said section contemplates a further or additional trial *inter partes* of the question, whether such separation of the parties shall be directed and the suit remanded as to some of the defendants and retained as to others? This language of the proviso 'if it further appear' (to said Circuit Court,) indicates a judicial investigation and finding, just as much as the words used in the first part of the clause, 'when it shall be made to appear to said Circuit Court.' The one no more implies a proceeding between the parties than the other; and it was clearly not the intention of Congress to require a preliminary trial of the question as to separating the parties and remanding the suit, so far as relates to some of the defendants; while retaining it as to others. Such a practice would involve innumerable collateral issues and lead to inextricable confusion in the due and orderly administration and disposition of the business of the court."

In Hills *vs.* Richmond and D. R. Co., (Circuit Court, N. D. Ga., 35 Fed. Rep., 81) Judge Newman, on a motion to remand a cause transferred to the Circuit Court upon a petition and affidavit filed in the State court and without having seen the opinion of Judge Deady in the case at bar, reached the same conclusion, and held that, so far as relates to the question under consideration:

"Section 2, of the act of March 3, 1867, does not change the practice as it formerly existed, so far as concerns defendant, seeking to remove from State to Federal courts, on the ground of prejudice or local influence. In respect to the plaintiff so seeking to remove the act in express terms makes it the duty of the Circuit Court where a case has been removed by the plaintiff on application of the other party to examine into the truth of the affidavit and the grounds therefor, but the absence of any such provision as to defendants clearly indicates that the law in this respect was not intended to be charged as to them."

In Huskins *vs.* Cincinnati N. O. N. T. P. O. & T. P. Ry. Co., (37 Fed. Rep., 504, Circuit Court N. D. Tennessee,) Judge Kee, on motion to remand, held:

"That under the act of Congress, March 3, 1887, s. 2, cl. 4, for influence or local prejudice the application may be made at any time before hearing in the State court, and that the existence of 'local prejudice or influence' is not a jurisdictional fact so as to entitle the adverse party to put it in issue for formal trial, and it is sufficient if it may appear to Federal Court by petition and affidavit."

In Cooper *vs.* Richmond and D. R. Co., (Circuit Court, N. D. Ga., 42 Fed. Rep., 6. 7,) Judge Newman, in an opinion concurred by Judge Pardee, after a careful consideration of all the previous decisions upon the questions, adhered to this previous ruling in Hill *vs.* Richmond, and held that:

"Since Act Cong. March 3, 1887, which provides for the removal of causes on the grounds of local prejudice, does not prescribe any mode of procedure, a petition for removal, accompanied by an affidavit by a person authorized to make it, stating of his own knowledge the existence of prejudice and local influence, is sufficient to justify an order of removal. Following Whelan *vs.* Railroad Co., 35 Fed. Rep. 849." And that

"Where such an affidavit is presented, the Court will not permit the adverse party to traverse it, and will not hear evidence on the subject. Following Whelan *vs.* Railroad Co., 35 Fed. Rep. 849."

Upon the question as to whether the Court will permit the adverse party to traverse the affidavit filed by the defendants, Judge Newman said:

"Now, the affidavit named being sufficient to authorize the order for removal, will the Court permit the other party to traverse the grounds of the affidavit, and hear evidence as to the existence of prejudices and local influence? We adopt the conclusion of the Court in the Whelan Case upon this subject also. The argument of Judge Jackson upon this subject in the case named (pages 861-866) leaves nothing to be added by us. It seems to us conclusive upon this question."

And, after giving a history of the passage of the act of 1867, continued:

"If the history of this act, in the respects named, be the proper subject for consideration, it seems to us conclusive upon the questions now presented and clearly negatives the idea that any investigation or inquiry such as we are requested to make here as to the existence of grounds of removal was contemplated by Congress. Irrespective of this, however, it appears that when Congress came to deal with the cases which had been removed to this court by plaintiff before the passage of the act, it provided that—

"The circuit court shall, on application of either party, examine into the truth of said affidavit and the grounds thereof; and, unless it shall appear to the satisfaction of said court that the party will be able to obtain justice in such State court, it shall cause the same to be remanded thereto." (24 St. U. S., 553.)

"It appears from this that when an examination into the truth of the affidavit, and the ground thereof, was contemplated it was so stated in express terms; and the statement of it there, we think, gives emphasis to its omission in the preceding part of section 2 in making provision for removal by the defendant. So that, giving no weight whatever to the history of the act, and construing it by what appears upon its face, the clear statement of the duty of the court in one case, and its entire omission in the other, is very significant, and leads to the conclusion that in the latter case no such duty was intended to be imposed."

In Broadhead *vs.* Shoemaker *et al* (Circuit Court, N. D. Ga., 44 Fed. Rep., 518.) on motion to remand the decision in Cooper *vs.* Railroad Co. was followed, and was held that—

"The removal on the grounds of local prejudice is not too late if the case, though it has once been decided, is yet to be tried *de novo* in the appellate tribunal before a jury, and that 'a petition for removal on the ground of local prejudice when in proper form and duly verified cannot be traversed or contradicted by the adverse party.'"

In re Pennsylvania Company, Petitioner, *supra*, which was a petition for a mandamus to the Judges of the Circuit Courts of the United States, for the District of Connecticut, to take jurisdiction of a suit which had been by the defendant removed from a State Court to said Circuit Court, and remanded to the State Court on motion of the plaintiff, a petition, affidavits and bond for removal, were filed in the State Court, and that Court ordered the removal, and the defendant thereupon filed a copy of the record in the Circuit Court. It is true, that at the same time, the defendant also filed a petition to the Circuit Court, reciting the steps already taken, realleging the ground of removal and praying the Court to take jurisdiction of the suit, but without a hearing upon the petition upon the motion of the plaintiff, the cause was remanded to the State Court. Suppose, as in the case at bar, the amount in controversy had exceeded two thousand dollars, and the Court instead of allowing the motion had denied it, and had taken jurisdiction of the cause and proceeded to hear it, would not that have been in effect a judgment of the Court that the truth of the allegation that from prejudice or local influence, the defendant would not be able to obtain justice in the State Court, had been made to appear to the Court, and would it have been held upon a writ of error that the showing made by the defendant was insufficient?

Mr. Justice Bradley, speaking for the Court in that case, said:

"There is another question raised in this case, on which it is proper that we should express our opinion. It arises upon the following words of the act: "When it shall be made to appear to said Circuit Court that from prejudice,' etc. How must it be made to appear that from prejudice or local influence the defendant will not be able to obtain justice in the State court? The act of 1867 only required an affidavit of the party that he had reason to believe that from prejudice or local influence he would not be able to obtain justice in the State court. Rev. Stat., Sec. 639, subdiv. third. By the act of 1887 it must be made to appear to the court. On this point, also, various opinions have been expressed in the Circuit Courts. Our opinion is that the Circuit Court must be legally (not merely morally) satisfied of the truth of the allegation that from prejudice or local influence the defendant will not be able to obtain justice in the State court. Legal satisfaction requires some proof suitable to the nature of the case, at least an affidavit of a creditable person, and a statement of facts in such affidavit which sufficiently evince the truth of the allegation. The amount and manner of proof required in each case must be left to the discretion of the court itself. A perfunctory showing by a formal affidavit of mere belief will not be sufficient. If the petition for removal states the facts upon which the allegation is founded, and that petition be verified by affidavit of a person or persons in whom the court has confidence, this may be regarded as *prima facie* proof sufficient to satisfy the conscience of the court. If more should be required by the court, more should be offered.

"In view of these considerations, we are disposed to think that the proof of prejudice and local influence in this case was not such as the Circuit Court was bound to regard as satisfactory. The only proof offered was contained in the affidavit of the general manager of the defendant corporation, to the effect that, from prejudice and local influence, the company would not be able to obtain justice in the Court of Common Pleas for Litchfield County, or any other State court to which, etc. We do not say that, as a matter of law, this affidavit was not sufficient

but only that the court was not bound to regard it so, and might well have regarded it as not sufficient."

On the other side of the question are decisions to the effect that the plaintiff may controvert by affidavits the showing made by the defendants. In Short *vs.* Chicago, Milwaukee & St. Paul Ry. Co , 34 Fed. Rep. 225, Mr. Justice Brewer, then Circuit Judge of the Eighth circuit, upon a motion to remand the case to the State Court, held: "that under the Act of Congress March 3, 1887, the Circuit Court is to determine whether or not the prejudice or local influence for which a removal is sought actually exists, and until that fact appears no removal can be ordered. He, however, held "that where a removal is sought under the Act of Congress, March 3, 1887, on the ground of prejudice or local influence the affidavit may be filed in the State Court and a certified copy in the Circuit Court."

And without positively deciding the question the learned judge said : "That if the question were presented so as to require a decision he should be," I quote from the opinion, "inclined to hold that an affidavit alleging in plain and unequivocal terms that such local prejudice does exist and that a fair trial cannot be had would entitle the party to a removal." He added, "I think, however, that that fact, like any other fact, may be challenged." And the decision upon this last point was followed in Dennison *vs.* Brown, 38 Fed. Rep. 535.

In Malone *vs.* Richmond D. R. Co., (35 Fed. Rep., 625.) Mr. Justice Harlan held :

"That upon an application for removal under the act of March 3, 1887, on account of prejudice or local influence 'it is the duty of the Circuit Court to examine into the truth of the fact alleged to support the grounds for removal, and to ascertain their existence.' And that 'the simple affidavit by the defendant stating in general terms the existence of such prejudice and its effects in the language of the statute, no opportunity having been given the plaintiff

by notice to controvert such statement, ought not to be accepted as sufficient proof of the existence of the fact.'"

This decision was followed by Judge Lacombe, in Amy *vs.* Manning, 38 Fed. Rep., 536, and in Rike *vs.* Floyd and others, 42 Fed. Rep., 247, by Judge Sage; by Judge Wallace, in Amy *vs.* Manning, (38 Fed. Rep., 868.) and by Judge Shiras, in Goldworthy *vs.* Chicago M. & St. Pl. Ry. Co., (38 Fed. Red., 769.)

There is another view of this question which to my mind is a strong argument to show that Congress intended that whatever hearing was had before the Circuit Court on an application to remove a cause should be *ex parte.*

It must be presumed that Congress intended to grant to non-resident defendants some practicable relief against prejudice and local influence by the Act of 1887. But, if it is held by this Court that the plaintiff has a right to deny the existence of prejudice and local influence, and produce evidence to show that it does not exist; that the plaintiff must be notified; and a trial had *inter partes*, before prejudice and local influence can be *made to appear* to the Circuit Court of the United States, will not the act become practically valueless ?

If notice is required to the plaintiff, it must be reasonable notice, and he must have time to meet the case made by the defendant seeking the removal. This and the time occupied in the hearing of the motion would enable a plaintiff desirous of trying his case in the State court, by delaying the proceedings in the Circuit Court of the United States, and possibly with the connivance of the State court, pressing the cause to trial in the State court, to prevent the removal of the cause, and to defeat the intention of Congress.

V.

IF THE PLAINTIFF IN THE COURT BELOW WAS ENTITLED TO DENY THE ALLEGATIONS AS TO PREJUDICE AND LOCAL INFLUENCE AND TO CONTROVERT THE SHOWING MADE BY THE DEFENDANTS, DID HE DO THE THINGS NECESSARY TO CLAIM THE RIGHT IN THE COURT BELOW AND TO BRING THE QUESTION OF HIS RIGHT TO THIS COURT FOR CONSIDERATION?

Assuming that upon the petition and affidavit for removal the record in this case which was before the court, and the facts heretofore referred to of the existence of which courts will take judicial knowledge, there was a sufficient showing on the part of the defendants to have justified the Circuit court in granting the removal, it becomes important to inquire whether if the plaintiff, under the statute, was entitled to do so, he took the necessary steps to controvert the showing made by the defendant, and thus bring the question of his right to do so before this court for determination. No affidavits on the part of the plaintiff were filed. There is nothing in the record to show that affidavits were offered. The recital in the opinion of the court cannot supply the defect in the record in this regard. Dickinson *vs.* The Planters Bank, 16 Wall., 250. If it could, such affidavits as are mentioned in the opinion of the court were clearly incompetent and insufficient, raised no material issue, and were properly disregarded.

In County Court of Taylor County *et al vs.* Baltimore & O. R. Co. *et al.* (Circuit Court Western District of Va., 35 Fed. Rep., 161) it was held that:

"Under act Cong., 1887, c. 373, § 2, cl. 4, providing 'that a removal shall take place when it is made to appear to the Circuit Court that from prejudice or local influence it (defendant) will not be able to obtain justice' in the State

courts, a plea by plaintiffs simply denying the defendant's belief in the existence of such prejudice or local influence is insufficient and raises no issue on that question, as the plea should affirm that it does not exist."

If the plaintiff desired to controvert the allegation and proofs of the existence of prejudice or local influence he should have done so by filing or offering to file some pleading or affidavit adapted to that purpose, putting the existence of such prejudice, etc., in issue. The alleged denial of prejudice or local influence is contained in a motion to remand; it is not made by the plaintiff and not verified. There is no bill of exceptions in the case, and no assignment of errors, and the only allusion to affidavits on the part of the plaintiff is contained in the motion to remand, and in the opinion of the court on the motion to remand, in these words:

"The motion concludes with a denial of the existence of the alleged 'prejudice and local influence' and asks the court to examine into the truth of the affidavit asserting the same, and the grounds thereof, and to that end the plaintiff offers to read the affidavits of sundry persons who state they do not believe in the existence of such prejudice and local influence."

This offer was under the authority of *In re* Pennsylvania Company, petitioner, *supra*, of testimony clearly incompetent, and the court committed no error in refusing to admit it. Counsel for defendants respectfully submits:

First. That the removal was in time.

Second. That the defendants, who were non-residents of Oregon, were authorized to remove the cause from the State to the Federal court.

Third. That the record before the United States Circuit Court was sufficient to make prejudice and local influence

appear to the court, and the judgment of the court on the motion to remand was in legal effect a judgment that the cause should be removed to the Federal court.

Fourth. That the plaintiff had no right to controvert the showing made by the defendants for removal of the cause.

Fifth. That if the defendant had a right to put in issue the allegation in the petition of the existence of prejudice and local influence he failed to do so.

My apology for the length of this brief is the number and importance of the questions involved and the diversity of the decisions of the Circuit Courts upon them.

J. N. DOLPH,
of Counsel for Defendants.